Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBBIE GUARGANA (WILLIAMS); JOHN HOPKINS; RUTH HOPKINS; husband and wife, and the marital community composed thereof,
Plaintiffs

MERLIN E. CARLSON, JR.
Plaintiff-Petitioner

v.

GENERAL ELECTRIC COMPANY, a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Respondents

On Petition for Writ Of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In diversity in a post-verdict setting does *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993) in as much as Fed.R.Evid.Rule 702 may apply, determine the sufficiency of causation evidence or does *Gasperini v.Center for Humanities, Inc.*, 518 U.S ___, 116 S.Ct. 2211, 135 L.Ed2d 659 (1996) require that the trial court under the *Erie* Doctrine apply state substantive law on the sufficiency of proof on causation?

In a diversity in a Rule 50(b) setting does the district court exceed its authority by applying *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993) admissibility standards in testing sufficiency of causation proof in a state based claim?

In a negligence in a Rule 50(b) setting does a trial court exceed its authority when it applies federal procedural law to wit *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993) instead of controlling state substantive law in testing the sufficiency of the causation proof?

In a diversity when there is an unchallenged and consistent Rule 49(a) special verdict does the trial court exceed its authority if the court resurrects "legally" non-essential previously waived issues to support a new trial ruling for determination of those issues that all parties and the court had previously waived by operation of Rule 49(a)?

When the basis of appeal is that the trial court lacked jurisdiction to set aside a 134 day old judgment, and there is bonafide proof that the trial court has *sua sponte* moved and granted, its own motion for a new trial by improperly using and applying Rules 49(a), 50(b) and 59(d), is it a denial of due process and the right to a jury trial for a court of appeals to avoid accepting jurisdiction?

LIST OF PARTIES

Petitioner is Merlin E. Carlson, Jr. (a Plaintiff in the District Court and an Appellant in the Court of Appeals). David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, Kathrene Froese, Deborah Williams, John Hopkins and Ruth Hopkins were Co-Plaintiffs in the District Court and Co-Appellants in the Court of Appeals.

Respondents are General Electric Company and Kaiser Aluminum and Chemical Corporation, who were Defendants in District Court and Appellees in the Court of Appeals.

LIST PURSUANT TO RULE 29.6

According to the prior corporate disclosure statement General Electric Company is a publicly held corporation with no parent companies. Its subsidiaries and affiliates are General Electric Capital Corporation; General Electric Credit International, N.V.; Montgomery Ward and Company, Inc.; General Electric Capital Preferred Asset Corporation; CAMCO, Inc. (Canada); General Electric Capital Services, Inc.; GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; GNA Corporation; Mercur Bank (Austria); Imaging Financial Services, Inc.; and Dart V. Kraft, Leasing Corporation.

Kaiser Aluminum and Chemical Corporation is a wholly owned subsidiary of Kaiser Aluminum Corporation. Kaiser Aluminum Corporation has equities securities which are publicly held. Kaiser Aluminum Corporation's parent, Maxxam, Inc., has debt and equity securities which are publicly held. Maxxam, Inc.'s affiliates with either publicly held equity or debt securities are Maxxam Group, Inc.; the Pacific Lumber Company; Scotia Pacific Holding Company; and Sam Huston Race Park, Ltd.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
LIST OF PARTIES ii
TABLE OF AUTHORITIES viii
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
RULES INVOLVED 3
STATEMENT OF THE CASE 3
A. Background Facts 3
B. Procedural Background 5
ARGUMENT FOR GRANTING THE WRIT 7
I There Is A Paramount Need To Reconcile Admissibility Of Expert Testimony With Test For Sufficiency Of Proof For State-Created Claims 7
II Rules 49(a), 50 And 59 Are Being Improperly Defined By Conflicting Applications Of *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). The Conflict Results In An Altered Outcome In Derogation Of The *Erie* Doctrine 10
III Predictability Of The Factors Influencing The Admission Of Expert Opinions And The Later Test For Sufficiency Of Proof Facilitate The Purpose Of Rule 1 12
IV If Rules 49(a) and 50 Are To Be Used Together There Are, And If Not, There Should Be Certain Ground Rules Enforced To Promote Just, Speedy, And Inexpensive Resolutions Of Disputes 13
V When There Is Bonafide Record That The District Court Exceeded Its Authority It Is Unacceptable For The Appellate Court To Avoid Or Abdicate Addressing The Jurisdictional Challenge 16

VI Failing To Accept A Jurisdictional Challenge The Court of Appeals Sanctioned The Unacceptable And Extremely Usual Proceedings Under The Law And The Civil Rules Of Procedure.....18

VII The Ninth Circuit's Endorsement Of The Trial Court's Rulings Improperly Abrogates Rule 49(a).....20

CONCLUSION.....22

APPENDICES

APPENDIX A

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., 120 F.3d 991 (9th Cir. 1997) (Opinion).....1a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash., Nov. 25, 1994) (Order Re: Post-Trial Motions).....16a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash., Nov. 25, 1994) (Order Re: Motions to Amend and Certify).....45a

APPENDIX B

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., Nos. 95-35092 and 95-35145 (9th Cir. Mar. 24, 1995) (Order On Jurisdiction).....50a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., Nos. 95-35092 and 95-35145 (9th Cir. Nov. 24, 1997) (Order Denying Rehearing) 52a

APPENDIX C

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. July 13, 1994) (Judgment in a Civil Case) 54a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. July 13, 1994) (Special Verdict Carlson) 58a

APPENDIX D

U.S. Constitution Seventh Amendment 62a
U.S. Constitution Fifth Amendment 62a
U.S. Constitution Article III 62a
Fed.R.Civ.P. 8(a) 64a
Fed.R.Civ.P. 49(a) 64a
Fed.R.Civ.P. 50(a) (b) 1963 version 65a
Fed.R.Civ.P. 50(a)(b) 1991 version 66a
Fed.R.Civ.P. 50(a)(b) 1995 version 67a
Fed.R.Civ.P. 59(d) 1966 version 68a
Fed.R.Civ.P. 59(d) 1995 version 69a
28 U.S.C. § 2072 ..... 69a
Wash. Const. Art. 1 § 21 ..... 70a
Rev. Code Wash. 5.40.050 ..... 70a

APPENDIX E

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. March 7, 1994) (Plaintiffs' Lists Of Claims, Theories Of Liability, And Identity Of Experts Who Will Be Called) 71a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, June 27, 1994) (Plaintiffs' Memorandum On Potential Instructional Error By Attempting To Define Area Of Injury) 88a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (Court's Instructions to the Jury [Jury Instructions on Damages, Nos. 28, 29, 31, 32, 33, and 34]) 93a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, July 27, 1994) (Defendants' Motion For Judgment As A Matter Of Law) 99a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, July 27, 1994) (Defendants' Motion For New Trial Or Alternative Relief) 101a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, December 9, 1994) (Motion That The Order Of November 25, 1994, Is A Final Decision And There Is No Just Reason For Delay) 103a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D.Wash, December 29, 1994) (Plaintiffs' Reply To Defendants' Opposition To Fed.R.Civ.P. 54(B) Language) 106a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, December 28, 1994) (Affidavit Of Marcia M. Meade In Response To Defendants' Opposition To The Fed. R. Civ. P. 54(B) Language [w/ attachments]) 113a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 31, 1995) (Brief In Support Of Motion To Dismiss) 125a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., Nos. 95-35092 and 95-35145 (9th Cir., January 17, 1995) (Appellant Carlson's Motion To Remand For Lack Of District Court Jurisdiction And Stay Of Schedule (Fed.R.App.P. 9th Cir. 27.11)) 133a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 17, 1995) (Appellant Carlson's Memorandum In Support Of Remand, Reinstatement Of Verdict, And Stay Of Proceedings Under Cir. R. 27-11.).....137a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., March 7, 1995) (Appellants' Schudel, Glass, Schudel, Schudel, Howell (Froese), Thompson, Hopkins And Hopkins Motion For Remand And For Stay Of Schedule Pursuant To Circuit Rule 27.11) 151a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., February 3, 1995) (Appellant Carlson's Reply To Appellee's Memorandum In Opposition Of Remand) 158a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., February 15, 1995) (Appellants-Plaintiffs' And Appellee Guaragna's Memorandum In Opposition To Motion To Dismiss) 166a

OTHER AUTHORITIES

Organic Solvent Encephalopathy: An Old Hazard Revisited. Am. J. Ind. Med., Vol. 22, 109-115 (1992) 183a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. January 18, 1994) (Offer Of Proof Of Daniel Goldstein)..... 198a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. March 7, 1994) (Declaration Of Samuel Milham, Jr. On Offer Of Proof) 205a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. March 7, 1994) (Offer Of Proof By Plaintiffs Re: The Testimony Of Paula A. Lantsberger, M.D.) 219a

TABLE OF AUTHORITIES

Page

CASES

A&G Stevedores v. Ellerman Lines,
369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962)..... 21

Ambroosini v. Labarraque,
101 F.3d 129 (D.C. Cir. 1996)..... 7

Bennett v. Dept. of L&I,
95 Wn.2d 531, 627 P.2d 104 (1981) 20

Bitzan v. Parisi,
88 Wn.2d 116, 558 P.2d 775 (1981) 15, 19

Browder v. Dept. of Corrections,
434 U.S. 257, 264 (1978) 20

Claar v. Burlington N. R.R.,
29 F.3d 499, 504 (9th Cir.1994) 8

Daubert v. Merrell Dow,
113 S.Ct. 2786, 509 U.S. 579,
125 L.Ed.2d 469 (1993)..... *passim*

Daubert v. Merrell Dow,
43 F.3d 1311 (9th Cir. 1995) 8

Eastman Kodak Co. v. Southern Photo Materials Co.,
273 U.S. 359, 71 L.#d. 684, 47 S.Ct. 400 (1927)..... 19

Eaton v. Nat'l Steel Production Co.,
624 F.2d 863 (9th Cir. 1980) 7, 19
Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 10
Ferebee v. Chevron Chem. Co.,
736 F.2d 1529 (D.C. Cir.), *cert. denied*,
469 U.S. 1062 (1984) 8
Floyd v. Laws,
929 F.2d 1390 (9th Cir.1991) 18
Freeman v. Hittle,
747 F.2d 1299 (9th Cir. 1984) 7
Gallick v. Baltimore & Ohio R. Co.,
372 U.S. 108, 83 S.Ct. 659,
9 L.Ed.2d 619 (1963) 18, 21
Gasperini v.Center for Humanities, Inc.,
518 U.S ___, 116 S.Ct. 2211 (1996) 11, 21
Guaranty Trust Co. v. York,
326 U.S. 99, 109 (1945) 11
Hopkins v. Dow Corning Corp.,
33 F.3d 116 (9th Cir.1994) 7
Intalco Aluminum v. L&I,
66 Wn.App. 664, 833 P.2d 390 (1992) 8, 12, 13, 19
Joiner v. General Elec. Co.,
___ U.S. ___, 118 S.Ct. 512 (1997) 13, 14
Kern v. Levelor Lorentzen, Inc.,
899 F.2d 772, 775, (9th Cir. 1990) 19
Lavender v. Kurn,
327 US 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) 20
McCord v. McGuire,
873 F.2d 1271, *amended*, 885 F.2d 650
(9th Cir. 1989) 8, 20
McLaughlin v. Cooke,
112 Wn.2d 829, 774 P.2d 1171 (1989) 12, 15, 19, 20

Peterman v. Chicago, Rock Island & Pacific RR Co.,
493 F.2d 88 (8th Cir.), *cert. denied*,
417 U.S. 947 (1974) 7, 17
Phillips v. Negley,
117 U.S. 665 (1886) 7
Reese v. Strohl,
907 P.2d 282 (1996) 16
Schudel v. General Elec. Co.,
120 F.3d 991 (9th Cir. 1997) ..... *passim*
Simms v. Village of Albion NY,
115 F.3d 1098 (1997) 20
Sofie v. Fiberboard Corp.,
112 Wn.2d 636, 711 P.2d 260,
780 P.2d 260 (1989) 19, 22
Stradley v. Cortez,
518 F.2d 488 (3rd Cir. 1975) 8
Walker v. Armco Steel Corp.,
446 U.S. 738, 751 (1980) 21
Wheeler v. Catholic Archdiocese,
124 Wn.2d 634, 880 P.2d 29 (1994) 22

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 2
28 U.S.C. § 1332(a)(i) 1
28 U.S.C. § 2072 ..... 3, 16, 21
29 U.S.C. § 1332(a)(1) 1

RULES & REGULATIONS

Federal Rules of Civil Procedure, Rule 8(a) 3, 19
Federal Rules of Civil Procedure, Rule 49(a) ..... *passim*
Federal Rules of Civil Procedure, Rule 50
1963 version ..... Appendix
Federal Rules of Civil Procedure, Rule 50(a)
1963 version ..... Appendix

Federal Rules of Civil Procedure, Rule 50(b)
1963 version ..... Appendix
Federal Rules of Civil Procedure, Rule 50
1991 version ..... *passim*
Federal Rules of Civil Procedure, Rule 50(a)
1991 version ..... Appendix
Federal Rules of Civil Procedure, Rule 50(b)
1991 version ..... *passim*
Federal Rules of Civil Procedure, Rule 54(b) 2
Federal Rules of Civil Procedure, Rule 59 ..... *passim*
Federal Rules of Civil Procedure, Rule 59(d) ..... *passim*
U.S. Constitution, Fifth Amendment 1
U.S. Constitution, Seventh Amendment 21

OTHER AUTHORITIES

Organic Solvent Encephalopathy: An Old Hazard Revisited. Am. J. Ind. Med., Vol. 22:109-115 (1992) 4

Organic Solvent Neurotoxicity: Facts and Research Needs, Scand. J. Work. Environ. Health, 11, supp. 1:35-60 (1985) 8

PETITION FOR WRIT OF CERTIORARI

Merlin E. Carlson, Jr., Plaintiff below and Petitioner herein, respectfully pray that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals, Ninth Circuit, entered on July 23, 1997, and affirmed by Order filed November 24, 1997, denying Carlson's Petition for Rehearing and Suggestion for Rehearing *en banc*.

The Ninth Circuit's rulings below are appropriate for this Court's consideration for several reasons. The Ninth Circuit's decision: (1) conflicts with several decisions of another United States Court of Appeals on the same important federal matter; (2) the decision conflicts with substantive state law on the burden of proof for causation. The important matter involved the above include: (1) whether by the use of *Daubert v. Merrell Dow* 509 U.S. 579 (1993) is purely a case of admissibility and not for sufficiency of evidence, thereby granting a new trial exceeds the trial court's authority; (2) may a court resurrect sub-issues that have been judicially waived by the operation of Rule 49(a); and (3) when considering a Rule 50(b) motion, may the district court resurrect sub-issues that have been waived pursuant to Rule 49(a).

The Ninth Circuit decision also represents a departure from the usual course of judicial proceedings by that it sanctioned a 134 day post-verdict district court's *sua sponte* resurrection. The departure from the usual and acceptable proceedings is of such a manner as to warrant the exercise of this Court's supervisory power. The Ninth Circuit decision also represents a departure from the usual course of judicial proceedings by either avoiding or abdicating an appeal based upon a jurisdictional challenge of a district court to *sua sponte* grant either a Rule 50(b) or Rule 59(d) motion 134 days post verdict.

OPINIONS BELOW

The judgments rendered at the trial court level and rulings by the trial court which give rise to the appeal to the Ninth Circuit

are the Judgment of July 13, 1994 [54-a],[1] (as applied to Petitioner Carlson), pertinent portions of trial court ruling of November 25, 1994 [16-a], and Amended Judgment of November 25, 1994. [45-a]. The opinion of the United States Ninth Circuit Court of Appeals that gives rise to this petition is *Schudel, et al. v. General Electric Co.*, 120 F.3rd 991 (9th Cir. 1997). [1-a]. By order filed November 24, 1997, the Ninth Circuit denied Hopkins petition for rehearing and suggestion for rehearing *en banc*. [52-a]

JURISDICTION

This action was commenced on September 30, 1991, in the Spokane County, Washington Superior Court. It was removed by Defendants General Electric and Kaiser Aluminum (hereinafter collectively referred to as G.E.) to the Federal District Court, Eastern District of Washington, based upon diversity of citizenship under 28 U.S.C. § 1332(a)(1). Following a 54-day jury trial, judgment was entered on July 13, 1994, in favor of Carlson. [54-a]. G.E. filed its motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) (hereinafter "Rule 50") and alternative motion for a new trial under Fed. R. Civ. P. 59 (hereinafter "Rule 59") on July 27, 1994. G.E. did not file a Notice of Appeal challenging the July 13, 1994, judgment.

On November 25, 1994, the trial court, *sua sponte*, without oral argument, granted judgment as a matter of law (hereinafter JMOL) in favor of G.E. on all Carlson's "non-neurological" claims and ordered a new trial on damages for Carlson. On January 15, 1995, the trial court certified the order as to Carlson under Rule 54(b).

Carlson appealed to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1291. The Ninth Circuit issued its opinion on July 23, 1997. *Schudel, et al. v. General Electric, Co.*, 120 F.2d 991 (9th Cir. 1997). Thereafter, on November 24, 1997, the Ninth Circuit denied Carlson's timely filed motion for rehearing and suggestion for rehearing *en banc*.

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[1] The Appendices for this Writ are separately bound in two volumes.

Pursuant to Supreme Court Rule 13.1 and 13.3, this petition for certiorari has been filed within 90 days of the denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

Due to the lengthy nature of the materials, the full text of the following Constitutional provisions, statutes and court rules are set forth in Appendix D:

U.S. Constitution Fifth Amendment
U.S. Constitution Seventh Amendment
U.S. Constitution Article III
Fed.R.Civ.P. 8(a)
Fed.R.Civ.P. 49(a)
Fed.R.Civ.P. 50(a) (b) 1963 version
Fed.R.Civ.P. 50(a)(b) 1991 version
Fed.R.Civ.P. 50(a)(b) 1995 version
Fed.R.Civ.P. 59(d) 1966 version
Fed.R.Civ.P. 59(d) 1995 version
28 U.S.C. § 2072
Wash. Const. Art. 1 § 21

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Background Facts.

Kaiser Aluminum Chemical Corporation worked with General Electric Company to clean-up twenty-five years of Polychlorinated biphenyls (herein "PCBs") contamination at the site known as Trentwood. (Herein both Kaiser Aluminum and General Electric will be collectively referred as "G.E" unless otherwise stated.) G.E. planned and did use known federally and state regulated hazardous chemicals to remove the PCBs.

In October 1988 Merlin E. Carlson, Jr., was working for Qualified Personnel, Inc., (herein "QPI") at Trentwood. Through G.E.'s negligence Carlson was repeatedly exposed to 5 to 10 times the permissible exposure limits of numerous hazardous chemicals.

He was injured by the repeated negligent exposures.

Independent of this litigation Washington's occupational epidemiologist, Dr. Samuel Milhem, Dr. Peter Houck from the Center of Disease Control, and Spokane County Health Department investigated the incident.[2] The investigators examined the work site and determined what and how hazardous chemicals[3] were used. Investigators referred the exposed workers to local physicians for further testing and treatment. After completing the investigation and medically following the exposed persons for years, the investigators published part of their medical findings in a peer-reviewed scientific journal.[4]

Carlson is described in the journal article. After the toxic exposures Carlson is a completely different person. He has persistent problems with impaired memory, confusion, significant depression, profound fatigue, personality change, headaches, coughing and shortness of breath. Medically the problems are so profound he is no longer able to live independently. His family takes care of him daily. He is totally unemployable.

Carlson was 23 years old when poisoned. He is a Native American of the Blackfeet tribe. He was chosen and trained from

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[2] Originally, the health department was investigating Legionella outbreak in a G.E. supervisor. When multiple workers presented with signs of poisoning the Dr. Milhem was called into investigate the occupational poisoning. [205-18a]

[3] The hazardous chemicals were principle two types — organic solvents and caustic detergents. Among many other chemicals Trichoroethane (TCA); Perchoroehtylene (PERC); Naphthalene; Trimethylbenzenes; 1,2,4-Trimethylbenzene (Xylene); Sodium Hydroxide; Aryl Sulfonate; Phosphate; Silicates; Chelate (EDTA-type); Alkyl aryl polyether; Phosphate ester; Sodium Tripolyphosphate; Surfactant Nonylphenoxpoly; Mono and Diakly Acid Phosphate; Ehylene gycol; Monobutyl ether; Cycohexanal; Monoehanolamine; C9-C12 Paraffins and C9-C12 Cycloparaffins were used. These hazardous chemicals were being mixed with other chemicals such as "409" and "Wiley's" driveway cleaner, then put in 409 spray bottles.

[4] *Organic Solvent Encphalophathy: An Old Hazard Revisited,* Am. J. Ind.Med. Vol. 22 (1992). [183-192-a]

age 11 to be a medicine man for the Blackfeet tribe.[5] Carlson is deeply ashamed that he is no longer able to fulfill his role as a medicine man. This loss for Carlson is a great spiritual loss and greatly diminishes his self esteem and identity.

Multiple expert and lay witnesses testified about G.E.'s negligence. Multiple medical doctors testified that more probably than not Carlson had been permanently injured by his toxic exposure to hazardous chemicals. Former employers, teachers, friends, family and the tribal chief testified as to Carlson's abilities and nature before and after the negligent poisoning. After a three month trial the jury found (1) G.E. negligent; (2) the negligence was a proximate cause of injury to him; (3) Carlson was not a "loaned servant"; and (4) damages were $2,775,768.00.

B. Procedural Background.

On September 30, 1991, Carlson and nine other plaintiffs filed a complaint for negligence in the Spokane Superior Court of the State of Washington. On February 25, 1992, G.E. had the action removed pursuant to 28 U.S.C. § 1446(a).

Pre-trial the district court ordered plaintiffs to list "each claim" against the defendants, including all theories of liability or causation. Carlson complied. [69-a]. Carlson's only "claim" was of negligence. In the same filing Carlson provided extensive disclosure of all his theories of negligence, his causation proof, and names of all expert witnesses and their respective subject area. Pre-trial there were extensive "*Daubert*" hearings on all challenged expert witnesses.[6] Then the court ruled that medical

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[5] In the Blackfeet culture this is a spiritual position in the community. There is a great deal of responsibility which attaches to the position in the tribe. Mr. Carlson was from a renowned family in the tribe, so it was a great honor and responsibility from him to assume a role as a medicine man.

[6] This trial was to occur shortly after the decision *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). Carlson's expert witnesses filed extensive offers of proofs with multiple attachments supporting their methodology from peer-reviewed published scientific textbooks and journals. For clarity the Offers of Proof for Drs. Goldstein, Lantsberger and Milhem. [198-a, 205-a, 219-a,] are

expert witness on "toxic encephalopathy" could testify.

Before deliberations the parties and the district court had a five day instruction conferences. Both Carlson and G.E. proposed special verdicts. The special verdict addressed each essential elements of a negligence and G.E.'s affirmative defense of "loaned servant." During the jury conference the court requested Carlson to submit a list of his contentions. He did so. [114, 117-118a]. At that time Carlson identified his position that it would be error to instruct on or list in the special verdict to specifically define the injuries. [88-90a], when the damage instructions under state law identified the elements. (Damage Instructions given are at 92-97a.)

The appropriate jury instructions, including instructions on damage were given. The special verdict given was basically what G.E.'s proposed. [58-59-a]. After a two week deliberation, verdicts were returned in favor of all plaintiffs. Before the jury was dismissed neither G.E. nor the district court proposed that the jury be required to make further or additional Rule 49(a) findings.

On July 13, 1994, a judgment for Carlson for $2,775,768.00 was entered. On July 27, 1994, G.E. served on Carlson's attorneys Rule 50(b) and 59(b) motions. G.E. did not move for a new trial based upon a claimed error in the special verdict. In the ten judicial days following entry of the judgment the district court initiated no motion for a new trial for any reason.

On November 25, 1994, 161 days after the verdict, the district court amended Carlson's judgment. The court ruled that there was sufficient evidence to support the jury findings of negligence, loaned servant and injury. The court then *sua sponte* ordered a new trial for a second jury to answer sub-issues of what damages were due to neurological and non-neurological conditions. The order was the first notice on the court's *sua sponte* motion for a new trial.

On December 9, 1994, Carlson moved for Fed.R.Civ.P.

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reproduced, and for brevity voluminous exhibits in original are not included

54(b) findings on the November 25, 1994, Order. Carlson submitted a lack of "jurisdiction," asserting that the trial court lacked jurisdiction to grant a new trial and citing to multiple authorities.[7] On December 21, 1994, Carlson filed a Notice of Appeal. On January 17, 1995, the district court certified the November 25 Order under Fed.R.Civ.P. 54(b), based on the jurisdictional challenge. On January 24, 1995, Carlson filed an Amended Notice of Appeal.

In the Court of Appeals Plaintiffs and G.E. moved under Fed.R.App.P. 27.11 for remand for lack of jurisdiction. On March 24, 1995, the Court of Appeals denied all motions. In denying G.E.'s motion to remand, the court cited the Fed.R.Civ.P. 54(b) certification and *Freeman v. Hittle*, 747 F.2d 1299 (9th Cir. 1984). On July 23, 1997, the Court of Appeals issued its opinion, ruling that the new trial order was interlocutory and not immediately appealable. [50-51a]. On August 6, 1997, Carlson petitioned for rehearing. On November 24, 1997, the Court of Appeals entered an order denying the petition. [52-53a].

ARGUMENT FOR GRANTING THE WRIT

I. There Is A Paramount Need To Reconcile Admissibility Of Expert Testimony With Test For Sufficiency Of Proof For State-Created Claims.

This petition, as does probably any modern civil case involving chemicals, has the undercurrent of this Court's decision in *Daubert v. Merrell Dow*,509 U.S. 579 (1993). Carlson's record from pre-trial through a Ninth Circuit appeal illustrates that there is a profound interrelation between *Daubert*, the rules of civil procedure and the *Erie* Doctrine. This interrelationship has profound impacts in diversity actions as well as the general orderly administration of litigation.

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[7] *Phillips v. Negley*, 117 U.S. 665 (1886); *Eaton v. National Steele Products*, 624 F.2d 863 (1980); *McCord v. Maguire*, 873 F.2d 1271(9th Cir. 1989); *Stradley v. Cortez*, 518 F.2d 448 (Cir. 1975); *Peterman v. Chicago, Rock Island & Pacific RR Co.*, 493 F.2d 88(8th Cir), cert. denied, 417 U.S. 947 (1974)

In one respect, perhaps this petition is slightly different. Carlson's pre-trial was shortly after the *Daubert* decision. The pre-trial and three month trial is essentially a cavalcade of almost every facet of *Daubert* from the last five years. The trial can be viewed as a three month *Daubert* hearing with a jury verdict at the end.[8] Over the last four years Carlson has been subjected to the emergence of two divergent case lines. His case history outlines the development of the conflict between the two *Daubert* lines.

Pre-trial Carlson's, G.E.'s and the district court's only guidance for addressing G.E.'s *Daubert* challenge to expert opinions was *Daubert*. Carlson modeled his proffers[9] on the law of *Ferebee vs. Chevron Oil Co.*, 736 F.2d 1529 (D.C. Cir. 1984), which had been endorsed under Washington's substantive law, *e.g. Intalco Aluminum v. Labor & Indus.*, 833 P.2d 390 (1992).[10]

G.E. advocated that *Daubert*, 509 U.S. 579 narrowed the admissibility.[11] In the discovery process, G.E. cited one article where two scientists reproached the medical community as to in medical care involving exposures to chemicals to beef up naming the chemicals.[12] The article was not a peer-reviewed, but rather

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[8] Originally the trial was scheduled for approximately 30 trial days. It lasted 54 **long** trial days, because of daily renewed *Daubert* challenges.

[9] Carlson anticipated an proffer under *Daubert* to be as has been recognized in the *Hopkins v. Dow Corning Corp.*, 33 F.3d 116 (9th Cir.1994) and *Ambroosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) line of cases

[10] *Intalco* involved a toxic exposure in an Aluminum plant. *Intalco* addressed state law on burden of proof for causation. *Intalco* reviewed causation and the burden of proof specifically in refers to chemical insults. *Intalco* recognized physician, who used the differential diagnosis methodology in arriving at opinions on a more probable than not basis as to the cause of a patient-claimant's condition was sufficient causation proof. Most important to Carlson, *Intalco* found unnecessary for causation to prove which and how much of a particular chemical in a soup of chemicals caused the injury.

[11] G.E. viewed a *Daubert* challenge along the *Claar v. Burlington N. R.R.*, 29 F.3d 499, 504 (9th Cir.1994), and *Daubert v. Merrell-Dow*, 43 F.3d 1311 (9th Cir.1995), for clarity referred to as *Daubert II*.

[12] *"Organic Solvent Neurotoxicity: Facts and Research Needs*, Scand. J. Work. Environ. Health, 11, supp. 1:35-60 (1985). Dr. Goldstein identified out

was an editorial commentary.[13] G.E. latched on to a rhetorical portion of the article. From this article, G.E. argued vigorously throughout that *Daubert* stood for the proposition that peer-reviewed literature was absolutely necessary for expert testimony.

In the presence of two distinctly divergent positions on *Daubert* the district court mounted a valiant and patience effort to grapple with the matter. In the daily *Daubert* challenges, Carlson constantly distinguished on the matter of the moment between "admissibility" and "burden of proof for causation" under state law. On the other hand G.E. argued that it was purely admissibility under federal law. In retrospect, the "war" between the litigants cut to the heart of whether *Daubert*, was law of a preliminary Fed.R.Evid.Rule 104(a) analysis as to admissibility or an emergence of a federal common law, which Carlson opposes as being in derogation of the *Erie* Doctrine. After the *sua sponte* rulings of the district court, Carlson notes the foundational heart of *Daubert*, 509 U.S. 579, includes whether it is law of "admissibility" and not of "sufficiency" or is it both.

On this record and the questions presented Carlson request this Court's direction in resolving the ever increasing conflict between the courts of appeals on the meaning and

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of context sentences were misleading. [200-201a]. In the 9 years since publication considerable scientific research published was published on solvents and injuries. [201a]. He identified where this editorial endorsed his methodology and supported his conclusions, that he reached from other "peer-reviewed" articles. [202-03-a]. Exhibits have not been reproduced herein.

[13] As a backdrop to the questions presented Carlson and scores of others were exposed to "numerous" hazardous chemicals and not just the two chemicals G.E. acknowledges.[183-192a, 206-207, 209, 216-18, 219-238] G.E. mixed these "numerous" hazardous chemicals up with other chemical products such as 409, Comet and Wiley's driveway cleaner. Records of the amounts of chemicals were kept, but no records of how the chemicals were mixed. G.E. took no air samples. Due to G.E. poor record keeping no one can honestly proffer an opinion as to the amounts and what other chemical were generated by all this mixing. It is simply known that hazardous chemicals at the Trentwood are known to react with other chemicals and it was dangerous.

application *Daubert v. Merrell Dow*, 507 U.S. 579. Leaving the matters that Carlson presents unanswered will only burden the system with injustice, confusion and expense in time and money.

II. Rules 49(a), 50 And 59 Are Being Improperly Defined By Conflicting Applications Of *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). The Conflict Results In An Altered Outcome In Derogation Of The *Erie* Doctrine.

Two divergent lines of cases have developed from this Court's decision in *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993). The conflict has increased with *Schudel v. General Elec.Co.*, 120 F.3rd 120 (9th Cir. 1997) decision. The conflict is primarily whether *Daubert* is a test for "admissibility" or also applicable post-verdict for determining the "sufficiency". In this debate a basic obvious inquiry has never been asked. The questions presented in Carlson[14] petition, now ask the obvious.[15]

The inquiry is: under diversity in a Rule 50(b) setting does federal or state law apply to determining "sufficiency" for a state-created claim? Logically, the procedure is Rules 50 and 59 diversity, but under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) state substantive law controls the testing of proof would post-judgment. State law is what defines the action, therefore state's substantive law defines each elements burden of proof. Carlson's petition illustrates what happens when the *Erie* Doctrine is shunted aside, and an adjudicated outcome set aside by federal

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[14] Carlson notes that the other Plaintiffs, who petition separately for this Court review, have asked repeatedly the same question. Other plaintiffs as Carlson did constantly at trial, post-verdict and on appeal point out *Daubert* was a case of admissibility, and the substantive law to apply was that of Washington.

[15] Through out pre-trial, trial and on appeal, Carlson repeatedly advised the courts that there was a difference between admissibility and the burden of proof, and that state substantive law applied to the burden of proof, *e.g.*, [81, 89, 90-a]. When the trial court exceeded its authority Carlson repeatedly asserted that although the matters of the moment were of federal procedure, what the court was to do was to apply state substantive law to the procedure, *e.g.*, [107-110, 114, 141,145,146-148].

procedural law in lieu applying state substantive law for the claim.

Carlson is not advocated that in diversity *Daubert v. Merrell Dow*, 509 U.S. 579 stops directing the district court's procedural gatekeeper role vis-à-vis proffers of expert opinion testimony. However, on the admissibility of expert opinions on "causation for a state-related claim", there is a duality of procedure and substantive law involved. Under the case law this duality is treated consistently between the Circuits and panel. In diversity the district court uses federal law for procedure, but are required to apply state substantive law. *Gasperini v.Center for Humanities, Inc.*, 518 U.S ___, 116 S.Ct. 2211, 2219 (1996). When the court is determining causation sufficiency Carlson submits, there is no duality between federal procedure and state substantive law. The law demands that the court applies state law for sufficiency of causation proof for the state-based claim. See, *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

Most recently, this Court addressed a confrontation between federal and state procedure in a post-trial context. *Gasperini*, 116 S.Ct. 2211. In resolving the question both this Court's majority and dissent addressed the implications of the *Erie* Doctrine in diversity matters involving both procedure and state substantive law. From *Gasperini*, Carlson is mindful of the due consideration to be given to *Guaranty Trust*'s, modification of the *Erie* Doctrine. The record and questions herein present a means for this Court to follow up on all facets of *Guaranty Trust's* reading of the "outcome-determination" test.

Carlson brings to this Court an opportunity to offer predictability to the daily circumstances of diversity and the Rules 49(a), 50(b) and 59. Under *Daubert*, 509 U.S. 579, the confusion and conflict surrounding expert causation proof have, and are, introducing chaos, when this Court's intent was to simplify. This petition provides an opportunity to address how the views of the *Erie* Doctrine as explored in *Gasperini*, and the clear federal procedure embodied in *Daubert v. Merrell Dow* can

be logically and rationally reconciled, as well as co-exist in the presence of a state-created claim and the attendant substantive law defining the burden of proof.

III Predictability Of The Factors Influencing The Admission Of Expert Opinions And The Later Test For Sufficiency Of Proof Facilitate The Purpose Of Rule 1.

Schudel's jurisdictional errors were probably made were because of confusion or conflict over what role *Daubert v. Merrell Dow*, 509 U.S. 579 plays at the different stages of a trial. Like the application of the *Erie* Doctrine, the answer to *Daubert's* use in diversity action is not mechanistic. This Court has opined: "We are confident that federal judges possess the capacity to undertake this review" [preliminary assessment an expert witnesses methodology]." *Daubert*, 482. Carlson observes there is a vast difference between having the intellectual acumen and actually knowing "how" to accomplish the task.

In this petition Carlson seeks to have this court clarify the conflict and assure appropriate consideration is given to state law. To his end Carlson summarizes that in diversity *Daubert* reasonably includes, *inter alia.*: (1) the gate keeper role is distinctly different from the post-verdict role under Rule 50(b) or 59; (2) that the focus of the admissibility inquiry is whether the underlying methodology is scientifically valid and properly applied to the facts of issue; (3) the focus is not on the conclusions but the methodology; (4) on the relevancy the proffer the court looks to state substantive law for the burden of proof for the "element"; (5) in any review of such matters as those suggested in *Daubert*, 509 U.S. at 483, the state substantive law for the burden of proof is a factor the court should, and perhaps must, consider; (6) with any admissibility inquiry due deference is given to state substantive law as to what is considered will eventually be applied for sufficient causation proof[16];(7)once a witness has passed the

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[16] This area of inquiry has the greatest risk for alteration in outcome. Consider, sufficiency of causation proof under *Intalco Aluminum v. Labor &*

preliminary muster, the court's role as to the expert opinion's changes, *e.g.* it is the jury's province to weigh the creditability of the witness and the testimony; and (8) under Rule 50 and 59 the court's inquiry is different from that in determining admissibility.

Currently, how and what Carlson summarizes above is resolved in any individual case depends upon which case line the trial court adopts. This Court's intervention is needed to introduce stability into diversity litigation and to assure the risk of the outcome being different is reduced.

IV. If Rules 49(a) and 50 Are To Be Used Together There Are, And If Not, There Should Be Certain Ground Rules Enforced To Promote Just, Speedy, And Inexpensive Resolutions Of Disputes

We are a nation of law and not a nation of science. The citizen's legal problems are not going to be solved by science, but with the law. One might think, if a judge can master understanding the "methodology" and "scientific reliability" that is 90 percent of the task. The courts may reason that Rules of Evidence and Civil Procedure[17] are the answers. Yet, experience tells the truth is not being discovered in Rules[18]. For example the record that supports Carlson's petition herein.

Understanding what a "claim" is fundamental to a fair, and rational application of Rules 49(a), 50 and 59. There is a vast difference between a "legal" claim and a "scientific" claim. There is an absolute need for this Court to address the legal distinction between the two for purposes of testing competency.

Indus. 833 P.2d 390 (1992) and *McLaughlin v. Cooke*, 774 P.2d 1171(1989) verse what the *Schudel* courts' applied.

[17] Carlson is mindful of *Joiner vs. General Elec.Co.*, ___ U.S. ___, 118 S.Ct. 512 (1997), which provides some guidance. *Joiner* does not answer the questions Carlson poses herein.

[18] The federal bench is working very hard and diligently to address the complications of chemical litigation. Carlson submits, the difficulties are because too much emphasis is being placed on understanding the science and not enough on the law.

This petition brings to this Court's attention that the courts are either confused or in conflict over how, when and what to do in reference to scientific evidence when using and applying Rules 49(a), 50 and 59. Carlson submits, part of the legal problem is that no court is addressing that there are both "procedural" and " substantive" considerations attendant to legally managing scientific evidence.

The lack of consistency in what the courts do all the proffered scientific literature at best is unpredictable. There are problems of the court treating scientific literature in the same manner as legal authorities. It appears in many of the *Daubert* decisions, *Schudel* included, have overlooked an important philosophical difference between the study of law and the scientific studies. Carlson proposes that Justice. Steven's dissent in *Joiner*, is exactly on point with reality. *Joiner*, 118 S.Ct. at 522. The treatment of the scientific record here in *Schudel* is utterly appalling.[19] The legal system cannot be made perfect, but certainly a better job can be done than is being done as far as actual judicial review of the accompanying scientific literature.

If one assumes the study of law operates by deductive reasoning and sciences by inductive reasoning. When the district

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[19] In *Schudel* the Ninth Circuit concluded Drs. Morton and Goldstein's extrapolations were not supported in science. This is very dangerous for a court to be making such statements about Federally Regulated Hazardous Chemicals. The court ought not encourage the violation of laws that are intended to protect workers and the community., *e.g.*, references [81-a]. The record herein is that many of the hazardous chemicals used at Trentwood, were by federal and state law to only be used with "self-contained respiratory" systems, *i.e.*, a ventilator with its own air supply. Mr. Carlson was given a PAPER MASK to protect his lungs. Carlson's exposure to caustic chemicals was not for minutes, it was for weeks. The exposures Carlson and the others endured were not low level exposures, where workers at least have the personal protective equipment that the law requires. If *Schudel* had looked at the three months of trial record, including G.E.'s own documents, there would have been no criticism of Drs. Morton's, Goldstein's, and Lantsberger's opinions.

court is considering the basis of an expert opinion is the court required to consider all the scientific material submitted in support of the witness's inductive analysis or does the court deduce from selected items whether the proof is scientifically sound. Is it improper for an appellate court in "deducing" whether a district court abused its discretion in admitting an expert opinion to select portions of the scientific offers of proof?[20]

In a Rule 50(b) and 59(d) related is what are courts do with defendants admissions pertinent to causation. For example, G.E. has an entire department that involved in the science, including the injuries caused by the chemicals used by G.E. Here the court either ignored or overlooked G.E.'s own scientific publications that stated the type of exposure Carlson had would injure him as it did, e.g., [78-80]. This is another example of why this Court needs to address the *Erie* Doctrine's application to scientific proof of causation. For in Carlson the test of sufficiency of causation proof would have reached a different outcome.[21]

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[20] Here, the trial court post-judgment determined Dr. Lantsberger's testimony on Mr. Carlson's respiratory injury tainted the verdict. The only way that court's conclusion could be reached was by totally ignoring Dr. Lantsberger's proffer. Her proffer included chapters out of standard medical textbooks on covering the know respiratory injuries associated with the chemicals that Carlson was exposed. [224 ¶16, 17; 228-229, 234, 235 ¶91]. There were hundred's of peer-reviewed scientific articles contained in the chapters. The court had to ignore her more-probable than not testimony based on all her clinical evaluations and treatments over five years. The most outrageous is that the court had to have totally ignored Dr. Milhem's independent peer-reviewed scientific article on this very poisoning. [183-192a, 205-218a] as well as hi s testimony. The trial court had to ignore all the lay testimony, including Carlson at age 23 before the poisoning was capable of engaging in all the physical activities of athletic young man, then after the poisoning he was lucky to walk a few blocks without significant shortness of breath. On appeal the Ninth Circuit looked at absolutely nothing of Carlson's proof, but concluded the trial court's ruling was appropriate. As far as procedure in for Rules 50 or 59 this is appalling lack of justice.

[21] For example, McLaughlin v. Cooke, Supra; Bitzan v. Parisi, 558

V. When There Is Bonafide Record That The District Court Exceeded Its Authority It Is Unacceptable For The Appellate Court To Avoid Or Abdicate Addressing The Jurisdictional Challenge.

Through out this petition Carlson has described and discussed the trial court's lack of jurisdiction. During the pendency of the matter several Ninth Circuit decisions construing *Daubert* were rendered. Pre-trial the court determined that the treating physicians use of the differential diagnosis process was a reliable "methodology" and that the expert's opinions had a generally acceptable scientific basis. Then post-judgment the court took completely different approach. Inherent to *sua sponte* motions with no hearings there is no opportunity for the litigants to carry on the discourse expected between the bar and bench.

134 days after a judgment was entered in favor of Carlson the district court *sua sponte* dismissed under Rule 50(b) portion of Carlson's case relating only to an "issue", set aside Carlson's judgment and ordered a new trial. In so ruling the court provided its first notice to Carlson of the court's *sua sponte* motion.[22] In making the *sua sponte* post-judgment motion the court improperly used *Daubert*. The district court did not apply controlling state law on the burden of proof for "causation in a negligence claim." This squarely brings to issue the *Erie* Doctrine. 28 U.S.C. § 2072(b) as well as other well settled federal law.

The ruling *sua sponte* 134 days post-judgment lacked jurisdiction in numerous respects. First, the court gave no notice and an opportunity to be heard on the court's own motions. See

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(1981) and Reese vs. Strohl, 907 P.2d 282 (1996).

[22] As to Carlson G.E. had timely made a Rule 50(b) motion for a JNOV on the negligence "claim". There was no Rule 50(b) motion made in the alternative for a new trial or for a judgment as a matter of law (JOML) on any "issue". Likewise, G.E. timely made a Rule 59(b) for a new trial or an alternative Rule 59 relief. The district court ultimately and specifically denied G.E.'s Rule 59 motion.

Fed. R. Iv. P. 59. Next, the court *sua sponte* resurrected sub-issues that both parties and the court had earlier waived under Rule 49(a). On its own motion, the court granted a JOML either under Rule 50(b) or 59(d) a new trial on damages for determination of resurrected previously waived sub-issues. In granting the MOL the court either created new "legal" claims—neurological claim verse non-neurological claim—or made a grievous error in confusing a "legal" claim, *e.g.*, with a "claim" perhaps made in science.

The district court engaged in uses and applications of Rules 49(a), 50(b) and 59(d) that were a gross distortion of the Rules of Civil Procedure. Carlson believes the court was either confused or in conflict, because what was clearly lacked authority.

VI. Failing To Accept A Jurisdictional Challenge The Court of Appeals Sanctioned The Unacceptable And Extremely Usual Proceedings Under The Law And The Civil Rules Of Procedure.

134 days post-judgment a party cannot move under either Rule 50(b) or 59, much less request a new trial on issues waived under Rule 49(a).[23] Avoiding Carlson's jurisdictional challenge, the Ninth Circuit sanctioned what a party may not do. The *Schudel*'s action conflicts with *Peterman v. Chicago, Rock Island & Pacific RR Co.*, 493 F.2d 88(8th Cir), *cert. denied*, 417 U.S. 947 (1974). In a post-trial motion setting, occurring more than 10 days after judgment, the trial court moved and granted its own motion for a new trial. *Peterman* remanded for reinstatement of the judgment. *Peterman* considered it a Rule 59(d) motion. Here, the Ninth Circuit ruled this district court's *sua sponte* ruling was under Rule 50(b).[24] *Schudel*, 120 F.3d at 995.

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[23] Rule 49(a) clearly warns the parties and the court, that if the court . . . omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted, unless before the jury was dismissed the party demands its submission to the jury.

[24] Rule 50(b) does not permit the court to initiate its own motion. It is

Schudel refused to acknowledge the prior Ninth Circuit law on the issue finality of a Rule 49(a). Citing this Court, *Floyd v. Laws*, 929 F.2d 1390 (9th Cir.1991), reinforced the court's duty to reconcile and harmonize the special verdict findings. Treating each finding as correct and consistent, the court simply can not choose to ignore each supported Rule 49(a) finding.[25] Picking up on the theory of "neurological and non-neurological" claims, *Schudel*, 120 F.3d at 994, side stepped that Rule 50(b) and 49(a) were intended to work together.[26]

Under this record *Schudel* presents three important matters as to Rules 49(a), 50(b) and 59(d). The matters are related and are: (1) if Rules 49(a) and 50(b) are intended to be used together, is the scope of Rule 50(b) limited by Rule 49(a); (2) is the scope of Rule 59(d) language that a new trial may be granted "for any reason for which it might have granted a new trial on motion of a party"[27] tempered by Rule 49(a); and (3) are there any *Erie* Doctrine proscripts attendant to the application of *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993) with a special verdict in Rule 50(b) and 59(d) settings.

VI. The Ninth Circuit's Endorsement Of The Trial Court's Rulings Improperly Abrogates Rule 49(a).

When presented with the appeal the Ninth Circuit's first inquiry is jurisdiction. The appeal was from lack of jurisdiction. The *Schudel* Court's actions conflict with well

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illogical that *Schudel* treats the district court's ruling as a Rule 50(b).

[25] *Gallick v. Baltimore & Ohio, R.Co.*, 372 U.S. 108 (1963)

[26] The 1991 Amendment of Rule 50(b) was intended so that it could be used with Rule 49(a). Working together, Rules 50(b) and 49(a) permit the parties to set whether a jury resolves specific or limited factual disputes. Using the Rules together allows the litigants latitude to set the simplicity or complexity of their particular dispute.

[27] The language in the 1995 version of Rule 59(d) is slightly different. The important matter raised, is the same under either version. Further, Carlson adopts as his all other *Schudel* plaintiffs-petitioners Writ of Certiorari as it relates to the retroactive application of Rule 59(d).

settled law. *Eaton v. Nat'l Steel Production Co.*,624 F.2d 863 (9th Cir. 1980). The Ninth Circuit overlooked the basic that jury verdicts are due considerable deference.[28] The record presented was that the district court was using the Rules of Civil Procedure that stripped the court of jurisdiction. It simply is unfair that Ninth Circuit focused on Rule 54(b), when Carlson was raising the lack of jurisdiction under Rules 49(a), 50(b) and 59(d). The *Schudel* court made the same error as the trial court in actually appropriately applying the applicable state law to the matter.[29]

Looking at current Washington law in cases involving chemicals and sufficiency of proof it was obvious the trial court's reasoning on "neurological and non-neurological" claims was not only illogical, e.g. Fed. R. Civ. P. 8(a), but on given the substantive law and causation it violated the *Erie* Doctrine. The outcome determinative implications of the trial court's post-trial ruling was glaringly apparent. For example in with the *Reese* Court referenced *Intalco Aluminum v. Labor & Indus.*, 833 P.2d 390 (1992). The physicians of *Intalco* employed the same methodology. Noting Dr. Rosenstock the *Intalco* observed at 833 P.2d at 399:

> [T]here are many examples in occupational medicine where an association between a patient's work conditions and disease has gone unnoticed for years, often because the patient's illness has been misdiagnosed. If this court were to accept Intalco's argument, the first victims of any newly recognized

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[28] Kern v. Levelor Lorentzen, Inc., 899 F.2d 772, 775, (9th Cir. 1990). Eastman Kodak Company v. Southern Photo Materials Company, 273 U.S. 359, 71 L.Ed. 684, 47 S.Ct. 400 (1927).

[29] The *Schudel* Court looked to a 1966 medical malpractice case on that discussed a small portion of Washington law on causation. It makes no sense for the *Schudel* Court to not look at the more current law of *Intalco Aluminum, Supra; McLaughlin v. Cooke; Supra.; Bitzan v. Parisi; and Sofie v. Fiberboard, Supra*, given the jurisdictional challenge and what Carlson pointed out to the court.

occupational disease be denied benefits simply because Drs. Longstreth and Rosenstock were the first physicians to systematically study the effects of pot room toxic exposures on the central nervous system of humans.

On the state substantive law Carlson's proof through Drs. Lantsberger, Goldstein and Milhem was in keeping with *Italco Aluminum*, 833 P.2d 400. In diversity the district court obviously lacked authority to apply federal procedural law in lieu of controlling state law in testing the sufficiency of the proof for causation. See also *McLaughlin v. Cooke*, 774 P.2d at 1175; *Bennett v. Dept. of L&I*, 95 Wn.2d 531, 627 P.2d 104 (1981)

A natural question is whether post-trial does a consistent Rule 49(a) verdict, in any manner constrain post-trial rulings. First, Carlson observes, if Rule 49(a) is not used with either or both Rules 50(b) and 59(b), then there is no point in Rule 49(a).

When Rule 49(a) is treated as disjunctive of Rules 50(b) and 59(d) the well settled law that "we will uphold the verdict if the evidence is sufficient with respect to any of the allegations." *McCord v. McGuire*, 873 F.2d 1271, 1274, amended 885 F.2d 650 (9th Cir.1989) citing, *Lavender v. Kern*, 327 U.S. 645 (1946). Here, the post-trial ruling was justified by suggesting that Carlson had not cooperated with drafting the Rule 49(a) form. Contrarily, see [88-90a]. Under the law the court had the power to overrule Carlson's objected to the court's proposal. When Rule 49(a) is read with Rules 50 and 59, the court is equally bound to the principle that " litigants [courts] have the responsibility to request or submit special verdict forms. *McCord*, 650 F.2d 650.

Schudel thwarts the intent that a special verdict is "to identify the basis for the jury's verdict, and thus avoid confusion, appellate uncertainty, and the need for additional proceedings." *Simms v. Village of Albion, N.Y.* 115 F.3d 1098, 1105 (1997). Sanctioning a disjunctive use of Rule 49(a), 50(b), and 59 *Schudel* contravenes a "just, speedy, and inexpensive trial Fed.R.Civ.P. 1.

Schudel's permitting the use of Rule 50(b), and implicitly 59(d), to resurrection waived Rule 49(a), is like extending a Statute of Limitations beyond its lawful expiration. Like jurisdictional limits set by the time limits of post-trial motions, Rule 49(a) sets a point in litigation when the number and extent of issues to be decided by jury is definite. See by analogy, *Browder v. Dept. of Corrections*, 434 U.S. 257, 264 (1978). Likewise, setting a point beyond which the court, on its own, may not submit additional issues to a jury is an important right for any party. In submitting this matter, Carlson suggest the *Schudel* courts us of either Rule 50(b) or 59(d) to the disregard of Rule 49(a) is prohibited by 28 U.S.C. § 2072(b).

It is a parties substantive right that "the first" jury's special findings are to be harmonized in a manner to make the verdict consistent. *A&G Stevedores v. Ellerman Lines*, 369 U.S. 355, 365(1962).[30] On this matter, it is pertinent that the Seventh Amendment is viewed as a means to "control the allocation of authority to review verdicts." *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. at 2214. If the scope rules of procedure are viewed to avoid "direct collision" with state law, but still giving its plain meaning,[31] what is the extent that the court may rule under Rule 50(b) or 59(d) on Rule 49(a) waived issues?

On the above, in diversity it is an important matter whether *Schudel's* sanctioning a trial court's post-judgment ruling to have a second jury segregate damages according to body parts violates the *Erie* Doctrine, 28 U.S.C. §2072 or both. For example in Washington damages are the provinces of the jury, meaning the verdict need not be broken down and attributed piece by piece to a particular injury.[32] The outcome would be altered in state court.

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[30] If a second special verdict cannot be harmonized, is there a third trial?

[31] *Walker v. Armco Steel Corp.*, 446 U.S. 738, 751 (1980) addressing the rationale of the *Erie* Doctrine.

[32] Washington law is unequivocal. The jury has the ultimate power to

CONCLUSION

Justice was not done for Merlin E. Carlson, Jr. Had his case been tried in state court, where he started it, the matter would be long over. Instead it is nine and half years since he was poisoned. The justice he is due, has been delayed because of confusion and conflict in the federal court system. The matters that Carlson raises are probably not unique to him given the conflict in Circuits and within the Ninth Circuit Court of Appeals.

Carlson has identified several basic inquiries as to federal procedure. Perhaps it can be said that when there is an area as the contentionous of chemical litigation and expert opinions on causation, it has the ability to tease out other problems just below the surface. The questions Carlson raises in his jurisdictional challenge concerning the use and application of Rules 49(a), 50(b) and 59(d) are potentially not unique to chemical litigation. Given this Court's direction to litigants and the district courts in Fed. R. Civ. P. 1, addressing how Rules 49(a), 50(b) and 59(d) are to work together will benefit all.

The problems with confusion and conflict over whether *Daubert v. Merrell Dow*, 509 U.S. 579, is about "admissibility" or "sufficiency" of the evidence must be addressed. It is too expensive in time and money for both litigants and the courts to wait. Answering the basic inquiry of when and how state substantive law is applied in matters of "causation" proof will increase the odds that the confusion and conflict will be reduced. Given the magnitude of chemicals in the community and work place, the courts' task of dealing with expert testimony is not going to stop. Have a clear statement of what is a matter of law and what is a matter of science will help.

Along with these important matters of federal questions this Court should exercise its supervisory authority to insure that

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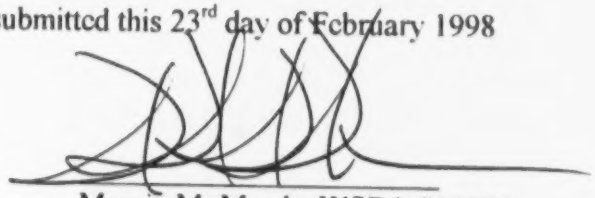
determine damages, including the amount, *Sofie v. Fibreboard Corp.*, 771 P.2d 771, 716-17(1989) reviewing and affirming well settled state damage law. Prohibiting first time request for segregation of damages. *Wheeler v. Catholic Archdiocese*, 880 P 2d 29, 33 (1994).

the district court is corrected in exceeding its authority under the then existing rules and case law. For reasons set forth above, Petitioner Carlson respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted this 23rd day of February 1998



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Merlin E. Carlson, Jr.

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBBIE GUARGANA (WILLIAMS); JOHN HOPKINS; RUTH HOPKINS; husband and wife, and the marital community composed thereof,
Plaintiffs

MERLIN E. CARLSON, JR.
Plaintiff-Petitioner

v.

GENERAL ELECTRIC COMPANY, a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Respondents

On Petition for Writ Of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX VOLUME I

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APPENDICES

APPENDIX A

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., 120 F.3d 991 (9th Cir. 1997) (Opinion) 1a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081, (E.D. Wash., Nov. 25, 1994) (Order Re: Post-Trial Motions) 16a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081, (E.D. Wash. Nov. 25, 1994) (Order Re: Motions to Amend and Certify) 45a

APPENDIX B

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., Nos. 95-35092, 95-35145 (9th Cir. 1995) (Order On Jurisdiction) 50a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., Nos. 95-35092, 95-35145 (9th Cir. 1997) (Order Denying Rehearing) 52a

APPENDIX C

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081, (E.D. Wash. July 13, 1994) (Judgment in a Civil Case) 54a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081, (E.D. Wash. July 13, 1994) (Special Verdict Carlson) 58a

APPENDIX D

U.S. Constitution Seventh Amendment 62a

U.S. Constitution Fifth Amendment 62a

U.S. Constitution Article III 62a

Fed.R.Civ.P. 8(a) 64a

Fed.R.Civ.P. 49(a) 64a

Fed.R.Civ.P. 50(a) (b) 1963 version 65a

Fed.R.Civ.P. 50(a)(b) 1991 version 66a

Fed.R.Civ.P. 50(a)(b) 1995 version 67a

Fed.R.Civ.P. 59(d) 1966 version 68a

Fed.R.Civ.P. 59(d) 1995 version 69a

28 U.S.C. § 2072 ..... 68a

Wash. Const. Art. 1 § 21 ..... 70a

Rev. Code Wash. 5.40.050 ..... 70a

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID SCHUDEL, et al.,
Plaintiffs,
and
DEBORAH GUARAGNA-WILLIAMS,
Plaintiff-Appellee,
v.
GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Appellants.

No. 95-35092

D.C. No. CV-92-00081-FVS

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; JOHN HOPKINS; RUTH HOPKINS, husband and wife, and the marital community composed thereof,
Plaintiffs-Appellants,
v.
GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Appellees.

No. 95-35145

D.C. No. CV-92-00081-FVS

OPINION

Appeals from the United States District Court
for the Eastern District of Washington
Fred Van Sickle, District Judge, Presiding

Argued and Submitted
October 8, 1996—Seattle, Washington

Filed July 23, 1997

Before: James R. Browning, Dorothy W. Nelson, and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Browning

SUMMARY

Civil Litigation and Procedure/Motions

The court of appeals dismissed appeals, vacated a judgment, and reversed orders of the district court. The court held that in considering a Rule 50(b) post-verdict motion for judgment notwithstanding the verdict (JNOV), a district court should not ignore erroneously admitted evidence.

Appellees David Schudel, Deborah Williams and others sued appellants General Electric Co. and Kaiser Aluminum and Chemical Corp. for damages, alleging injuries from exposure to toxic substances and loss of consortium.

At trial, the only evidence on causation on behalf of appellants Daniel Glass, Craig Thompson, and David, Tim, and Sandra Schudel (Schudel plaintiffs) was the testimony of Dr. Paula Lantsberger. She based her expert opinions on two theories: specific condition causation and "whole person aggravation."

In addition to Dr. Lantsberger, Drs. Morton and Goldstein testified on neurological symptom causation on behalf of Williams. The district court approved their reliance on interview data relating to the plaintiffs' symptoms that was collected by Diane Nebel while she was investigating an incident of Legionnaire's disease at Kaiser's facility.

Drs. Goldstein and Lantsberger testified that the Nebel

data were the kind that toxicologists consider reliable and regularly rely on. Dr. Morton testified that Williams suffered from brain damage that was "more probably than not" caused by exposure to solvents (TCA and Perc) that General Electric had used to clean up toxic substances at Kaiser's facility.

Dr. Goldstein conceded that none of the organic solvents involved in this case had been proven to be neurotoxic; that it would be improper to make inferences as to the toxicity of TCA and Perc based on the toxic nature of other solvents; and that repeated exposure to organic solvents over a long period must be documented to establish a causal relationship. Two studies cited by Dr. Goldstein (Altman and Kalifant studies) involved TCA and Perc. The Altman study found no relationship between exposure to Perc and the brain damage or loss of consciousness alleged by the plaintiffs. The Kalifant study involved long-term, repetitive exposure to TCA at high levels.

A jury returned verdicts for the plaintiffs. On defense motions for JNOV or a new trial, the district court affirmed the verdict for Williams, but granted JNOV with respect to respiratory injuries alleged by appellant Merlin Carlson, and as to neurological injuries asserted by appellant Kathrene Froese, John Hopkins, and Ruth Hopkins (Froese plaintiffs). The court vacated the verdicts for them on the ground that they were "tainted" by evidence of injuries as to which JNOV had been granted, and ordered a new trial. Lastly, the court granted JNOV on all the claims of the Schudel plaintiffs. In doing so, the court excised Dr. Lantsberger's testimony relating the "whole person aggravation" theory, having concluded that it was inadmissible. Both sides appealed.

[1] The court of appeals has jurisdiction to review final judgments on entire claims, not on individual issues. An order adjudicating only one issue that is not determinative of an entire claim is not appealable. [2] Litigants who advance a single legal theory of liability applied to one set of facts allege a single claim. Carlson and Froese alleged a single claim of negligence, not separate claims for neurological injury and respiratory injury. The Hopkinses alleged claims for negligence and loss of consortium, not separate claims for neurological injury and respiratory injury as to each claim.

[3] The district court granted JNOV as to issues related

to certain injuries allegedly suffered by the plaintiffs because of the defendants' negligence. The court of appeals had no jurisdiction to review the district court's rulings on those issues because the claims for negligence and the derivative claims for loss of consortium were not finally determined. The order granting a new trial was also interlocutory and not immediately appealable.

[4] When deciding a JNOV motion, a trial court may not ignore evidence erroneously admitted at trial. Excluding evidence after the verdict is unfair to a party who may have relied on the determination that the evidence was inadmissible. [5] The record should be taken as it existed when the trial closed.

[6] The district court properly concluded that Dr. Lantsberger's testimony based on the "whole person aggravation" theory should have been excluded. However, once the jury rendered its verdict based on the improperly admitted evidence, the district court erred in excising that evidence when ruling on the JNOV motion. Considering all the evidence, there was sufficient evidence to support the verdict in favor of the Schudel plaintiffs.

[7] Nonetheless, these verdicts could not stand. The district court erred in denying the defendants' motion for a new trial. A new trial should be granted when the erroneous admission of evidence affected the substantial rights of the parties. Dr. Lantsberger's testimony was the only evidence of causation; its erroneous admission was undoubtedly prejudicial.

[8] The trial judge must determine that proposed scientific expert testimony will be both reliable and relevant. [9] Scientific knowledge is reliable if it is grounded in the methods and procedures of science and connotes more than subjective belief or unsupported speculation. In determining reliability, the focus must be solely on principles and methodology, not on the conclusions that they generate.

[10] Evidence of scientific knowledge is relevant if the reasoning or methodology properly can be applied to the facts in issue. A court's determination of relevance must consider the applicable substantive standard. Under Washington tort law, a plaintiff must show that the act complained of "probably" or "more likely than not" caused the subsequent disability.

[11] The Nebel data provided the basis for much of the scientific testimony presented by Williams' experts. [12] The

district court acted within its discretion in approving the use of the data by Williams' expert witnesses. Dr. Morton's testimony met the relevance requirement. However, it did not meet the requirement of reliability.

[13] Dr. Morton's conclusions were based on extrapolations from studies that involved solvents other than TCA or Perc and examined long-term exposure at relatively low concentrations, or short-term exposure at very high concentrations, rather than short-term, moderate-level exposure sustained by Williams. Dr. Morton did not establish that it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals.

[14] The district court erroneously reasoned that because there was evidence that acute exposure to TCA and Perc can cause toxic encephalopathy, whether Williams' exposure was sufficient to cause her symptoms was a question for the jury. Williams' exposure was neither long enough nor intense enough to fall within the ranges described in the studies Dr. Morton relied upon. Extrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable.

[15] Dr. Goldstein acknowledged that the mechanism of neurotoxicity from TCA and Perc had not been demonstrated. [16] Dr. Lantsberger's testimony failed to meet the relevance requirement. She testified that it was only a "possibility," not a "probability," that Williams suffered from brain damage from exposure to solvents. Dr. Lantsberger admitted that she could not testify to a specific cause and effect relationship between Williams' exposure and health problems. She relied on a "whole person aggravation" theory without establishing that it had a scientific basis. [17] Dr. Lantsberger's testimony regarding the hazards of TCA and Perc was inadmissible. Like Dr. Goldstein, she relied on the Altman and Kalifant studies to reach her conclusions, and admitted that medical science had not determined the effects of short-term exposure to the solvents.

[18] Only one of the expert witnesses whose testimony was not challenged provided causation testimony, and it related only to Williams' respiratory injury. [19] Considering all the evidence admitted at trial, the district court properly denied the defendants' JNOV motion with respect to Williams. However,

admission of the challenged testimony was prejudicial because it was the sole causation evidence with respect to Williams' neurological symptoms.

COUNSEL

Donald W. Fowler and Joe G. Hollingsworth, Spriggs & Hollingsworth, Washington D.C., and James B. King, Keefe, King & Bowman, Spokane, Washington, for the defendants-appellants-cross-appellees.

Craig F. Schauermann, Schauermann & Thayer, Vancouver, Washington, and Marcia M. Meade, Dawson & Meade, Spokane, Washington, for plaintiffs-cross-appellants David Schudel, Timothy Schudel, Daniel Glass, Sandra Schudel, Merlin Carlson, Kathrene Howell, and Craig Thompson.

Thomas C. Phelan, Vancouver, Washington, for plaintiffs-cross-appellants John and Ruth Hopkins.

Craig F. Schauermann, William K. Thayer, and David I. Gedrose, Schauermann & Thayer, Vancouver, Washington, for plaintiff-appellee Deborah Guaragna-Williams.

Kit A. Pierson, Jenner & Block, Washington D.C., for the amicus curiae.

OPINION

BROWNING, Circuit Judge:

This diversity case involves claims for damages from negligence and loss of consortium against defendants General Electric Company and Kaiser Aluminum and Chemical Corporation. Kaiser contracted with General Electric to clean up polychlorinated biphenyls (PCBs) at Kaiser's Trentwood facility in Spokane, Washington. Nine of the ten plaintiffs were employed

by General Electric on the cleanup.[1] These plaintiffs alleged they developed various neurological and respiratory problems from exposure to two cleaning solvents, trichloroethane (TCA) and perchloroethylene (Perc).

A jury returned verdicts for the plaintiffs. The defendants moved for JNOV or new trial. The district court affirmed the verdict in favor of one plaintiff, Deborah Williams. The court granted JNOV with respect to respiratory injuries[2] asserted by Merlin Carlson ("Carlson") and with respect to neurological injuries[3] asserted by Kathrene Froese, John Hopkins, and Ruth Hopkins ("the Froese plaintiffs"). The court ordered a new trial with respect to injuries of Carlson and the Froese plaintiffs as to which JNOV had not been granted. Finally, the court granted JNOV on all claims asserted by the five remaining plaintiffs ("the Schudel plaintiffs"[4]).

Defendants appeal the verdict in favor of plaintiff Williams. The other plaintiffs appeal the granting of motions for JNOV or new trial. We address four issues: (1) whether the district court had jurisdiction over the defendants' motions for JNOV or new trial; (2) whether we have jurisdiction to review the district court's order for JNOV and new trial as to Carlson and the Froese plaintiffs; (3) whether the district court erred by granting JNOV against the Schudel plaintiffs without considering expert testimony the court concluded after trial had been erroneously admitted; and (4) whether the district court properly admitted expert testimony on behalf of plaintiff Williams.

I. District Court Jurisdiction Over the Defendants' Motions For JNOV or New Trial

Plaintiffs argue the district court lacked jurisdiction to

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[1] The tenth plaintiff, Sandra Schudel, did not work at the site, but asserted a loss of consortium claim as the wife of plaintiff Tim Schudel.

[2] With respect to Carlson, the term "respiratory injuries" applies to respiratory injuries, fatigue, overall body pain, and all other all alleged injuries that do not fall within the term "neurological injuries."

[3] With respect to these plaintiffs, the term "neurological injuries" applies to neurological injuries, headaches, rashes, and all other alleged injuries that do not fall within the term "respiratory injuries."

[4] David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson.

consider defendants' motions for JNOV or new trial because the motions were not properly served.[5] When the motions were filed, Federal Rules of Civil Procedure 50 and 59 required the defendants to both file and serve such motions within ten days after entry of judgment.[6] Defendants filed the motions and delivered them to Federal Express for service on the tenth day after judgment. While personal delivery or delivery to the U.S. Postal Service would have satisfied the service requirement, delivery to Federal Express did not. *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431 (9th Cir. 1996).

Rules 50 and 59 were amended in 1995, however, to require only that such motions be filed, not served, no later than 10 days after entry of judgment. *See* Fed. R. Civ. P. 50(b), 59(b). The amendments took effect December 1, 1995, and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." S. Ct. Order, Amendments to the Federal Rules of Civil Procedure (Apr. 27, 1995).

This proceeding was pending on December 1, 1995, and no prejudice will result from application of the amendments. All parties have briefed the substantive, non-jurisdictional arguments in detail. No additional action on the part of the court or the parties is required to proceed. We have applied amended federal rules of appellate procedure retroactively in similar circumstances. *see Schroeder v. McDonald*, 55 F.3d 454, 459-60 (9th Cir. 1995); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994), and do so here.

II. Appellate Jurisdiction Over Order Granting JNOV and New Trial to Carlson and the Froese Plaintiffs.

The district court granted JNOV with respect to respiratory injuries allegedly sustained by Carlson and with respect to neurological injuries allegedly sustained by the Froese plaintiffs. The court vacated the verdicts for these plaintiffs on

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[5] Plaintiff Carlson does not raise this issue; his attorney was timely served.

[6] *See* former Fed. R. Civ. P. 50(b) ("Such a motion [for judgment as a matter of law] may be renewed by service and filing not later than 10 days after entry of judgment."); former Fed. R. Civ. P. 59(b) ("A motion for a new trial shall be served not later than 10 days after the entry of judgment.").

the ground that they were "tainted" by the evidence of the injuries as to which JNOV had been granted, and ordered a new trial as to Carlson's neurological injuries and the Froese plaintiffs' respiratory injuries. The court certified appeals from the orders for new trial pursuant to Federal Rule of Civil Procedure 54(b).[7]

[1] We have jurisdiction to review final judgments on entire claims, not on individual issues. An order adjudicating only one issue that is not determinative of an entire claim is not appealable even if a district court certifies the order under Rule 54(b). *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1039 (9th Cir. 1991). We must determine independently whether a certified judgment is final as to a particular claim.[8] *Id.*

[2] Litigants who advance a single legal theory of liability applied to one set of facts allege a single claim. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 (1976). Carlson and Froese alleged a single claim of negligence, not separate claims for neurological injury and respiratory injury. Similarly, the Hopkinses alleged claims for negligence and loss of consortium, not separate claims for neurological injury and respiratory injury as to each claim.

[3] The district court granted JNOV as to issue related to certain injuries allegedly suffered by plaintiffs because of defendants' negligence. We have no jurisdiction to review the court's rulings on these issues because the claims for negligence and the derivative claims for loss of consortium have not been finally determined. The order granting new trial is also interlocutory and not immediately appealable. *Allied Chem. Cor. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Roy v. Volkswagenwerk*

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[7] Under Fed. R. Civ. P. 54(b), when a lawsuit involves multiple claims or multiple parties, a district court "may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

[8] Carlson and the Froese plaintiffs argue the standard of review is not *de novo*, but abuse of discretion. We review the certification of an appeal under Rule 54(b) for abuse of discretion. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991). Even though a decision is certified under Rule 54(b), however, we must independently ensure that we are dealing with a final judgment before exercising jurisdiction. *Arizona State Carpenters*, 938 F.2d at 1039.

Aktiengesellschaft, 781 F.2d 670, 671 (9th Cir. 1985).[9]

III. Excising Testimony in Granting JNOV

The Schudel plaintiffs argue the district court erred in excising the previously admitted testimony of Dr. Paula Lantsberger before granting defendants' motion for JNOV. We agree.

Dr. Lantsberger was the only witness on causation on behalf of the Schudel plaintiffs. Dr. Lantsberger described symptoms and offered specific testimony regarding causation under two theories: a specific condition causation theory; and a "whole person aggravation" theory. The defendants filed a motion to exclude Dr. Lantsberger's causation testimony prior to trial and a motion to strike the testimony during trial. The district court did not rule on these motions.

After the jury returned verdicts in favor of plaintiffs and defendants moved for JNOV, the court held that Dr. Lantsberger's causation testimony based on the "whole body aggravation" theory had been admitted erroneously. The court then considered the sufficiency of the remaining evidence to support the jury verdicts and granted the motion for JNOV. The court denied defendants' alternative request for a new trial.

[4] Four circuits have held that, when deciding a motion for JNOV, a trial court may not ignore evidence erroneously admitted at trial, reasoning that excluding evidence after the verdict is unfair to a party who may have relied on the determination that the evidence was admissible.[10] "If evidence is

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[9] Carlson and the Froese plaintiffs argue this court has jurisdiction to review a conditional grant of a new trial under Fed. R. Civ. P. 50(c). *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 n.15 (9th Cir. 1989) (stating that appellate courts may review conditional new trial orders because the plain language of Rule 50(c)(1) expressly permits this review). The district court ordered a new trial under Rule 50(b), not Rule 50(c)(1). The order was not conditioned on reversal of the order granting JNOV. Rule 50(b) does not provide for review of non-conditional new trial orders.

[10] *See Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir. 1993); *Douglas v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Midcontinent Broadcasting Co. v. North Cent. Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir. 1973). The Third Circuit has held that such

ruled inadmissible during the course of the trial, the plaintiff has the opportunity to introduce new evidence. However, when that evidence is ruled inadmissible in the context of deciding a motion for JNOV, the plaintiff, having relied on the evidence already introduced, is unable to remedy the situation." *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (11th Cir. 1993).

[5] We recently indicated we would abide by the same rule. *See Central Office Tel., Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 993 (9th Cir. 1997). We now hold that when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial closed. This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps unnecessarily; and district courts need not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair; and the remedy of a new trial is available to put both sides on an equal footing. *Jackson*, 980 F.2d at 696 n.4.

[6] The district court properly concluded that Dr. Lantsberger's testimony based on the "whole person aggravation" theory of causation did not meet the standard of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (*Daubert I*), (outlined in Part IV of this opinion), and should have been excluded. Once the jury rendered its verdict based on the improperly admitted evidence, however, the district court erred in excising that evidence when ruling on the motion for JNOV. Considering all the evidence admitted at trial, including Dr. Lantsberger's "whole person aggravation" theory testimony, we conclude there was sufficient evidence to support the jury verdicts in favor of the Schudel plaintiffs.

[7] Nonetheless, these verdicts may not stand. The district court erred in denying defendants' motion for new trial. A new trial should be granted when the erroneous admission of

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exclusion is proper as long as other evidence relating to the same issue was not barred during trial as cumulative, reasoning that the moving party has a competing interest in litigating a case only once and expressing doubt that litigants would hold back significant evidence at trial. *Lightning Lube, Inc., v. Witco Corp.*, 4 F.3d 1153, 1199-1200 (3d Cir. 1993).

evidence affected the substantial right of the parties. Fed. R. Civ. P. 61. Dr. Lantsberger's testimony was the only evidence of causation; its erroneous admission was undoubtedly prejudicial.

IV. The Defendants' Appeal

Defendants argue the neurological symptom causation testimony of Dr. William Morton, Dr. Daniel Goldstein, and Dr. Lantsberger underlying the jury verdict for Deborah Williams was not admissible under Federal rule of Evidence 702.[11]

A.

[8] The Supreme Court held in *Daubert I*, 509 U.S. at 590-91, that Rule 702 requires the trial judge to determine that proposed scientific expert testimony will be both reliable and relevant. *See also Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1313 (9th Cir. 1995) (*Daubert II*).

[9] Scientific knowledge is reliable if it is "ground[ed] in the methods and procedures of science" and "connotes more than subjective belief or unsupported speculation." *Daubert I*, 509 U.S. at 590. In determining reliability, "[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595.

[10] Evidence of scientific knowledge is relevant if the "reasoning or methodology properly can be applied to the facts in issue." *Id.* at 593; *see also Daubert II*, 43 F.3d at 1315 (evidence of scientific knowledge must "logically advance[ ] a material aspect of the proposing party's case"). A court's determination of relevance must consider the applicable substantive standard. *See id.* at 1320. Under Washington tort law, a plaintiff must show that the "the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 440 P.2d 823, 830 (Wash. 1968). This is virtually the same as the standard under California tort law applied in *Daubert II*. *See* 43 F.3d at 1320. Under this standard, we held in *Daubert II* that expert testimony offered to prove causation did not satisfy the

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[11] Defendants also argue the trial court should have held a pretrial hearing on the admissibility of the testimony of Williams' experts. Because we conclude the expert testimony should have been excluded, we do not decide whether a pretrial hearing should have been held.

relevance requirement because the evidence suggested only that use of the drug at issue "could *possibly* have caused plaintiffs' injuries," rather than "more likely than not" caused the injuries, i.e., that use of the drug more than doubled the likelihood the injuries would occur. 43 F.3d at 1320-22.

B.

[11] The district court approved reliance by Williams' experts on interview data collected by Diane Nebel. Nebel contacted many of the workers at the Kaiser facility after one of the project supervisors fell ill with Legionnaire's disease. Nebel found no evidence of Legionnaire's outbreak, but did discover that some of the workers, including the plaintiffs, suffered from various medical symptoms. The data collected in Nebel's Legionnaire's disease investigation provided the basis for much of the scientific testimony presented by Williams' experts at trial.

[12] The district court acted within its discretion in approving the use of this data by Williams' expert witnesses. Dr. Goldstein and Dr. Lantsberger both testified the data was of the type toxicologists consider reliable and regularly rely upon. *See* Fed. R. Evid. 703.

Dr. Morton testified that plaintiff Williams suffered from solvent-induced toxic encephalopathy which "more probably than not" was caused by exposure to Perc and TCA. Dr. Morton's testimony met *Daubert's* relevance requirement. However, it did not meet *Daubert's* requirement of reliability.

[13] Dr. Morton's conclusions were based on extrapolation from studies that: (1) involved organic solvents other than TCA or Perc; and (2) examined long-term exposure at relatively low chemical concentrations or short-term exposure at very high concentrations, rather than the short-term, moderate-level exposure sustained by Williams. Dr. Morton did not establish it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals; indeed, the testimony indicated small differences in molecular structure often have significant consequences.

[14] As to differences in length and intensity of exposure, the district court erroneously reasoned that because there was evidence that acute exposure to TCA and Perc can cause toxic

encephalopathy, whether Williams' exposure was sufficient to cause her symptoms was a question for the jury. Williams' exposure was neither long enough nor intense enough to fall within the ranges described in the studies Dr. Morton relied upon. Extrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable.[12]

Dr. Goldstein's testimony suffered from similar deficiencies. Dr. Goldstein conceded that only five organic solvents, none of which were involved in this case, had been proven to be neurotoxic. He also testified that it would be improper to infer conclusions as to the toxicity of TCA and Perc based on the toxicity of other solvents, and that repeated exposure to nonpersistent toxins such as organic solvents over a long period must be documented to establish a causal relationship.

[15] Dr. Goldstein acknowledged that the biochemical mechanism of neurotoxicity from TCA and Perc has not been demonstrated. Only two studies cited by Dr. Goldstein involved TCA and Perc, and neither met *Daubert* standards. The Altman study found no relationship between exposure to Perc and the toxic encephalopathy or loss of consciousness alleged by the plaintiffs. The Kalifant study involved long-term (7-15 years), repetitive exposures to TCA at high levels.

[16] Dr. Lantsberger's testimony failed to meet *Daubert's* relevance requirement. She testified it was only a "possibility," not a "probability," that Williams suffered organic brain damage from exposure to solvents at the facility. Dr. Lantsberger admitted she could not testify to a specific cause and effect relationship between Williams' exposure and health problems. She relied instead on a "whole person aggravation" theory without establishing that the theory had a scientific basis.

[17] Dr. Lantsberger's testimony regarding the hazards of TCA and Perc was inadmissible under *Daubert*. Dr. Lantsberger, like Dr. Goldstein, relied on the Altman and Kalifant articles to reach her neurotoxicity conclusions, and like Dr. Goldstein, admitted that medical science has not determined the

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[12] Given our analysis of the admissibility of Dr. Morton's testimony, we need not consider defendants' contention that his testimony should have been excluded because testimony based on case reports is not admissible under *Daubert*.

effects of short-term exposure to the solvents involved.

[18] Plaintiff Williams points to other expert witnesses whose testimony was not challenged by defendants. Only one of these experts provided causation testimony, and his testimony related only to Williams' respiratory injury.

[19] Considering all the evidence admitted at trial, including the erroneously admitted evidence, we hold the district court properly denied defendants' motion for JNOV with respect to Williams. Admission of the challenged expert testimony was prejudicial, however, because it was the sole causation evidence with respect to Williams' neurological symptoms. Accordingly, we vacate the judgment entered on the jury verdict, reverse the district court's denial of defendants' motion for a new trial, and remand.

CONCLUSION

We lack jurisdiction to review the district court's grant of JNOV and new trial as to plaintiffs Merlin Carlson, Kathrene Froese, John Hopkins, and Ruth Hopkins, and DISMISS their appeals.

We REVERSE the grant of JNOV and the denial of the motions for new trial as to the plaintiffs David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson, and REMAND.

We find plaintiff Deborah Williams' neurological expert testimony on causation inadmissible, VACATE the judgment entered on the jury verdict in her favor, REVERSE the denial of the motion for new trial, and REMAND.

DISMISSED in part, and VACATED, REVERSED, and REMANDED in part. No costs allowed.

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NOV 25 1994
JAMES R. LARSEN, CLERK
DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et al, et ux. Plaintiffs, vs. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION, Defendants.	NO. CS-92-081-FVS ORDER RE POST-TRIAL MOTIONS

BEFORE THE COURT are certain post-trial motions. They were decided without oral argument on November 22, 1994. See Local Rule ("LR") 7(h)(3).

I. PLAINTIFFS' MOTION TO STRIKE

A. Background

Judgment was entered on July 13, 1994. On July 27, 1994, the defendants filed motions for both judgments as a matter of law and a new trial. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59. That same day, copies of the motions were mailed to opposing counsel via Federal Express.

The plaintiffs now move the Court to strike the defendants' Rule 50(b) and Rule 59 motions. They argue that the

motions were not served in a timely manner.

B. Ruling

Motions for judgment as a matter of law and for a new trial must be filed and served within ten days of the date judgment is entered. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59(b). In calculating the ten-day deadline, neither intermediate weekends nor legal holidays are counted. Fed.R.Civ.P. 6(b). Thus, the defendants had until the twenty-seventh of July to file and serve their Rule 50(b) and Rule 59 motions.

It is undisputed that the defendants mailed copies of their motions to all opposing parties by Federal Express on July 27, 1994. Since "[s]ervice by mail is complete upon mailing," Fed.R.Civ.P. 5(b), the defendants' motions would appear to have been both filed and served prior to the deadline.

The plaintiffs disagree. They contend that sending documents by Federal Express does not constitute "mailing" within the meaning of Rule 5(b).

Notwithstanding the plaintiffs' disagreement, they have failed to cite a single decision adopting their interpretation of Rule 5(b). They are forced to rely upon Transco Leasing Corp. v. United States, 992 F.2d 552, 554 n.2 (5th Cir. 1993), a case in which the Fifth Circuit cautioned, in dicta, "that service by Federal Express may not be service by mail."[13]

The defendants, by contrast, have cited two district courts decisions that considered – and rejected – the plaintiffs' position. Both held that Rule 5(b) does not require mailing through the United States Postal Service. United States v. Certain Real Property & Premises Known As 63-29 Trimble Rd., 812 F.Supp. 332, 334 (E.D.N.Y. 1992); Edmond v. United States Postal Serv., 727 F.Supp. 7, 11 (D.D.C. 1989), rev'd on other grounds, 949 F.2d 415 (1991).

Here, it was reasonable for the defendants to believe that the method of service they utilized would be more prompt than ordinary first class mail, and every bit as reliable. Given the plaintiffs' failure to cite authority supporting their interpretation of Rule 5(b), and the fact that two district courts have specifically rejected their position, the plaintiffs' motion to strike will be

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[13]Professors Wright and Miller mention Transco, but do not analyze the issue. 4A C. Wright, A. Miller, Federal Practice and Procedure, § 1148 (2d ed. Supp. 1994).

denied.

II. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW.

The defendants offer six reasons why the Court should grant judgment as a matter of law. Fed.R.Civ.P. 50(b). They are as follows: (1) the plaintiffs' experts based their opinions upon unreliable data; (2) certain experts were not qualified, and their opinions do not constitute "scientific knowledge" within the meaning of Rule 702; (3) even if the disputed opinions are admissible, they fail to establish causation; (4) under Washington law, many of Dr. Lantsberger's opinions regarding causation are legally insufficient; (5) the plaintiffs were loaned servants; and (6) Kaiser owed no duty of care to the plaintiffs.

A. Reliability/Loaned Servant/Duty

Not all of the defendants' arguments require in-depth analysis. The first, fifth, and sixth may be disposed of rather quickly.

1. Reliability of Data

The Court refused to admit the "Nebel" exhibits because they were hearsay, and the plaintiffs had not demonstrated the applicability of an exception to the hearsay rule. Moreover, even if an exception had applied, the exhibits were cumulative. (Tr. at 5790-91).

Later, the defendants attempted to impeach Craig Thompson with statements he made to Ms. Nebel. See Fed.R.Evid. 801 (d) (2) (A) (admission by party-opponent). The plaintiffs objected. (Tr. at 5970.) In sustaining the objection, the Court said, in part, "They [the Nebel exhibits] were not admitted because of concerns about reliability."" (Tr. at 5984.)

The defendants have interpreted the court's statement as a finding that the Nebel exhibits were unreliable. When both sections of the transcript are read in context, it is evident that no such finding was intended.

2. Loaned Servant

The jury was instructed properly on the question of "loaned servant." Since there is substantial evidence to support the jury's determination that the plaintiffs were not loaned servants, there is no basis for granting the defendants judgment on

this issue.

3. Duty of Care

With Respect to the question of "duty," the defendants have cited no new authority. The Court is satisfied that a duty existed.

B. Admissibility of Certain Expert Opinions

The second argument focuses on the admissibility of opinions given by Drs. Lantsberger, Goldstein, and Morton. The defendants submit that these three witnesses were not qualified to render opinions regarding toxic encephalopathy, and that their theories of organic brain damage are not supported by the scientific literature.

Both prongs of the second argument were raised prior to (and during) trial. After reviewing the materials presented by the parties, the Court ruled against the defendants on both issues.

Since then, the Ninth Circuit has decided two civil cases, the outcome in each hinging on the admissibility of expert testimony. Both opinions discuss the requirements of Rule 702 in light of Daubert v. Merrel Dow Pharmaceuticals, Inc., ____ U.S. ____, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Both agree that expert testimony may not be admitted unless the trial judge first determines that the expert's conclusions are based upon scientific knowledge. Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1124 (9th Cir. 1994); Claar v. Burlington Northern R. Co., 29 F.3d 499, 502 (9th Cir. 1994).

Although Hopkins and Claar are clearly relevant here, neither dictates a result different than that previously reached by the Court. As a result, the Court declines to disturb its prior rulings regarding toxic encephalopathy.

C. Sufficiency of Certain Expert Opinions (Background)

The third and fourth arguments challenge the sufficiency of certain expert opinions – primarily those of Dr. Lantsberger. Because this part of the defendants' Rule 50(b) motion attacks sufficiency, it is necessary to describe the disputed opinions in some detail.

1. Dan Glass

Mr. Glass reported a number of symptoms to Dr. Paula Lantsberger, including heart palpitations, headaches, memory loss, and respiratory problems. Dr. Lantsberger was the only expert

who attempted to link any of Glass' specific symptoms to work at Kaiser.

(a) Deposition Testimony

During a deposition in November, 1993, Dr. Lantsberger testified that she "just [didn't] know what caused [the heart palpitations]." (Tr. at 2317.)

With respect to a headache Glass complained of during May, 1990, Dr. Lantsberger testified that "it was probably a more migrainous type of headache and that its' probably not [related] to his exposure." (Tr. at 2325.)

Dr. Lantsberger was asked the following question regarding a headache Glass reported during September, 1991. "[I]s it true that the headache that he complained of when you last saw him is unrelated to his industrial exposure at Kaiser?" (Tr. at 3180.) "True," she replied. Id.

Dr. Lantsberger was asked what factors she had considered in determining whether Glass' brain had been injured during the cleanup. They included "his function and his performance since working at Kaiser," "the absence of any objective, neurologic findings," and "the literature on mixed organic solvents." (Tr. at 3181.) Having considered those factors, she was asked whether it was true that she had concluded "that [Dan Glass] did not sustain brain damage as a result of working at Kaiser in 1988." Id. "Correct," she said. Id.

Finally, Dr. Lantsberger was asked to review a report prepared by Dr. Patricia Sparks, a board-certified specialist in occupational medicine. (Dr. Sparks had examined Mr. Glass at the request of Washington's Department of Labor and Industries.) In her report, Dr. sparks had said "that there is no respiratory, neurological or mental impairment resulting from [Glass'] previous exposures on a more probable than not basis." (Tr. at 2350.) Dr. Lantsberger was asked whether she agreed with that statement. Once again, her response was, "Correct." Id.

(b) Direct Examination

Dr. Lantsberger's testimony at trial was dramatically different. She now said that it was probable that Glass had a pre-existing lung condition which had been aggravated by "exposure to chemicals." (Tr. at 1893.) She now assumed that Glass' headaches were related to the exposure. (Tr. at 1895.) She now opined "that there may be a relationship between his heart

symptoms while working on the site and his exposure to the chemicals." (Tr. at 1897.) Finally, in apparent reference to allegations of memory loss and difficulty in concentrating, she now said "that the symptoms that [Glass] was complaining of that had been a change over his base line would be related to his exposures." (Tr. at 1899.)

(c) Cross-examination

Dr. Lantsberger testified that she first examined Dan Glass during October, 1989, approximately ten months after the cleanup project. He did not complain of respiratory problems. (Tr. at 2288.) His examination was essentially normal. (Tr. at 2298.) He had normal pulmonary functions. (Tr. at 2305-06.) At that point, Dr. Lantsberger did not diagnose any respiratory injury or disease. (Tr. at 2312.)

Glass next went to Dr. Lantsberger during May, 1990. Once again, he neither mentioned respiratory problems, nor did Dr. Lantsberger diagnose any. (Tr. at 2326.) Glass did complain of headaches. However, during cross examination, Dr. Lantsberger conceded that she could not say there was a specific cause-and-effect relationship between his industrial exposure and the headaches he described. (Tr. at 2326.)

Dr. Lantsberger's last examination of Mr. Glass occurred during September, 1991. (Tr. at 2333.) At that time, he made no mention of respiratory problems. Id. He did, however, report headaches and memory loss. (Tr. at 2332.)

With respect to the former, Dr. Lantsberger again conceded that she was unable to find a cause-and-effect relationship between Glass' work at Kaiser and the headaches he mentioned. (Tr. at 2334.) With respect to the latter, Dr. Lantsberger's answers were somewhat coy. Nevertheless, when pressed by defense counsel, she finally acknowledged that she agreed with two other experts who had reported that Glass had no neurological or psychological impairment as a direct result of his work at Kaiser. (Tr. at 2347-52.)

(d) First Redirect Examination

On redirect, Dr. Lantsberger said that she thought Mr. Glass had experienced an "alteration in his level of consciousness" while working at Kaiser. (Tr. at 3099.) She did not, however, attempt to link that phenomenon with a specific injury.

Later, Dr. Lantsberger was asked whether it made

"scientific sense" to determine whether each condition Mr. Glass' complained of could be attributed to work at Kaiser. (Tr. at 3138.) She denied that it did, insisting that "you have to look at the patient as a whole." Id.

Insofar as her prior testimony was concerned, Dr. Lantsberger said, "I was trying to indicate that as a specific, isolated, single, sole source cause, no, I couldn't ascribe things as each individual cause. I had to take them as a whole and as an aggregate group of, aggregate group of people, to provide the data I needed to develop my opinions." Id.

(e) First Recross Second Redirect

During First Recross, Dr. Lantsberger was impeached with her prior deposition testimony. (Tr. at 3179-81.) In an effort to rehabilitate her, counsel for the plaintiffs attempted to show that the statements quoted by defense counsel referred to an examination requested by the Department of Labor and Industries. Plaintiffs' counsel implied that in the context of a Labor and Industries examination, a finding of "impairment" must be based upon certain limited objective factors. (Tr. at 3203-06.)

At best, the effort at rehabilitation was only partially successful. As notes above, it is clear that the opinion which Dr. Lantsberger gave during her deposition (i.e., that Mr. Glass had sustained no brain damage) was based upon both subjective and objective factors. (Tr. at 3181.).

2. David Schudel

Mr. Schudel has been examined by Dr. Lantsberger on a number of occasions. Although Schudel described a number of symptoms, there were (at most)two medical conditions which Lantsberger was willing to say were more probably than not caused by his work at Kaiser. One was a sensitization to odors; the other was an "aggravation" of his "whole person."

(a) Deposition Testimony

David Schudel had been tested by psychologists Paul Domitor and Lloyd Cripe. Having reviewed that testing, Dr. Lantsberger was asked whether it was her "medical opinion that Mr. [David] Schudel does not have brain damage as a result of his industrial exposure at Kaiser?" (Tr. at 2980.) She replied, "Correct." Id.

During her deposition, Dr. Lantsberger described Schudel's reaction to odors as a "conditioned response." (Tr. at 2989.) She explained it this way:

> I kind of liken it to the Pavlov's dog theory. Then you put the dog, ring the bell, associate it with food, the dog salivates. You take Dave. You put him out with chemicals. You have somebody's investigation proceeding where he is seeing health effects that make him scared. Subsequently[,] he continues to be scared around chemicals.

(Tr. at 2990). Dr. Lantsberger was asked whether it was the investigation conducted by the county health department which rang the bell "and set in motion what has become — what has been a sort of cascading conditioned response from Mr. Schudel." Id. "Correct," she said. Id.

(b) Direct Examination

Dr. Lantsberger's causation testimony was interesting. When asked for the cause of "David Schudel's emotional reaction to smells." (Tr.at 1777), she said, "I think that on a reasonable medical certainty he did not have this before his initial exposure in 1988 and subsequently to that I think that it's, on a more probable than not basis, related to his initial chemical exposure in '88.") Id. In other words, since Schudel did not react to odors before being exposed to chemicals at Kaiser, it must be the exposure which caused the reaction.

Later, Dr. Lantsberger described certain pulmonary function tests which had been administered to Mr. Schudel after the trial was underway. (Tr. at 1840-41.) According to Dr. Lantsberger, the results indicated that Schudel's reaction to odors was not strictly psychological. (Tr. at 1841-42.)

Thereafter, Lantsberger was asked two additional causation questions. The first was "whether David Schudel's physical problems with chemicals, as far as his lungs, is in any way related to the 1988 clean-up?" (Tr. at 1843.) To this question she replied, "I do think that some of the problems that he's having with his lungs and reactions are reactions to his, his lung condition are related to this exposures in the '88 clean-up." Id.

As a second causation question, Lantsberger was asked "whether David Schudel would have these problems that you've identified if he was provided with adequate working protective

gear in 1988?" (Tr. at 1843-44.) Ultimately, she said, "I think that if they had had respiratory protection equipment at that time frame, I don't think that he would be reacting as badly as he has now." Id. at 1844.

(c) Cross-examination

During the course of cross-examination, Dr. Lantsberger conceded that David Schudel does not have Reactive Airway Dysfunction Syndrome. (Tr. at 2978). She further conceded that he did not sustain brain damage while working at Kaiser. (Tr. at 2979).

Since the Kaiser project, Schudel has had numerous tests, including methacholine challenge tests, pulmonary function tests, neuropsychological tests, and chest x-rays. (Tr. at 2992.) Dr. Lantsberger acknowledged that prior to trial, none of the tests had revealed any pathology. (Tr. at 2992.) It was not until the Spring of 1994 (five and one-half years after the cleanup project) that Dr. Lantsberger was able to produce test results which "showed some alteration in pulmonary function capabilities." (Tr. at 2993-94.)

By the end of cross examination, Dr. Lantsberger had begun to back away from her earlier diagnosis. When asked whether the most recent pulmonary function test results could be described as a conditioned response, Lantsberger said, "I don't ascribe as much of that to the conditioned response now that we've got some of the other confounding variables out of the way. We've gotten the smoking out of the way, and I have data with him on a work site with nurses monitoring him on the work site." (Tr. at 3012.)

(d) Redirect

On redirect, Dr. Lantsberger twice asserted that David Schudel had experienced an alteration of consciousness while working at Kaiser. (Tr. at 3073, 3098.) No effort was made to link Schudel's alteration of consciousness with Lantsberger's prior diagnosis.

Later, counsel for the plaintiffs asked Lantsberger whether she had been cross-examined regarding "David Schudel as . . . a whole, live person or was it to the isolated incidences [sic] of his existence?" (Tr. at 3140-41.) The latter, Lantsberger said. Id.

Plaintiffs' counsel asked whether it is "scientifically sound to

consider David Schudel in terms of isolated incidences [sic]?" Id. "No," Dr. Lantsberger said, "it is not. You have to look at him in a whole." Id.

Finally, counsel for the plaintiffs asked, "Would you please tell the jury if you have any opinion as to David Schudel as a whole person in relationship to this exposure to the chemicals in 1988 on a more probable than not basis?" Id. After an objection, Lantsberger said, "[T]aking . . . into account the totality of his information and all of the information that was presented, in an aggregate way, I think that it was more probably than not an aggravation." Id.

(e) First Recross Second Redirect

During First Recross, Lantsberger again admitted that Schudel sustained no brain damage from working on the cleanup. (Tr. at 3189.) during Second Redirect, Lantsberger was asked to return to what plaintiffs' counsel described as "the Pavlov's dog analogy." (Tr. at 3218.) Although Lantsberger had appeared to distance herself from that comparison at the close of cross-examination, she now reiterated the theory. (Tr. at 3219, 3221.)

3. Craig Thompson

Dr. Lantsberger described a variety of symptoms while testifying on Mr. Thompson's behalf. Only a limited effort was made to link any of them to the cleanup project on a more probable than not basis.

(a) Deposition Testimony

Dr. Lantsberger first saw Mr. Thompson in October, 1989. He complained of memory loss, among other things. (Tr. at 2655.) With respect to memory loss, Dr. Lantsberger was asked the following questions during a deposition which took place in November, 1993. "[I]s it your testimony that his complaints of memory loss in 1989 may possibly have been due to his industrial exposure, but you can't say with probability that they were?" (Tr. at 2660.) "Correct," she replied. Id.

(b) Direct Examination

At one point, Dr. Lantsberger said that Thompson complained to her of feeling "very sleepy" and "high" while working at Kaiser. (Tr. at 1789-90). At another, she said she had treated him for memory loss. (Tr. at 1800). However, Lantsberger did not testify that Thompson's mental sensations reflected neurologic injury; nor did she say that his memory loss

could be attributed (on a more probable than not basis) to work at Kaiser.

With respect to respiratory impairment, Lantsberger testified that Thompson "had indicated to me that he had had an increase in the symptoms that he's had since his exposure while he was at work." (Tr. at 1821.) The increase in symptoms was apparently enough to persuade Lantsberger "that the exposure on the work site aggravated his lung conditions." (Tr. at 1822.)

(c) Cross-examination

Dr. Lantsberger saw Mr. Thompson during October, 1989. The physical examination was normal, with the exception of "crackles in the bases of his lungs." (Tr. at 2676.) Besides doing a physical exam, Dr. Lantsberger ordered a number of tests. While a chest x-ray and pulmonary function tests were normal, (Tr. at 2679, 2685), a methacholine challenge test was positive. (Tr. at 2680.)

Mr. Thompson went to Dr. Lantsberger during June, 1990, complaining of a sore throat and cough. (Tr. at 2694.) She diagnosed an upper respiratory infection. (Tr. at 2695.) When asked whether the infection was "probably related or caused by his industrial exposure," (Tr. at 2696), she replied, "As a direct, single affect [sic], causal relationship, no." Id.

During December, 1990, Thompson was seen by one of Dr. Lantsberger's colleagues. (Tr. at 2703.) He had an upper respiratory infection. Id. According to Lantsberger, Thompson "may have had more sensitive respiratory mucosa, resulting in him having an increased susceptibility to infection." (Tr. at 2704.) However, when questioned by defense counsel, she conceded that it was a possible cause not a probable cause. Id.

Thompson went to Lantsberger during January, 1991, for another respiratory infection. (Tr. at 2706.) Lantsberger was asked whether it was true that the infection had a possible- – but not a probable- – relationship to this work at Kaiser. Id. She said, "As a specific single etiology causal factor, correct." Id.

Thompson went from February, 1991, until September, 1992, without further respiratory problems. (Tr. at 2720.) During an examination in September, 1992, Lantsberger detected crackles in his lungs. (Tr. at 2721.) However, she conceded that the crackles were consistent with his "significant" smoking. Id.

(d) Redirect Examination

Dr. Lantsberger explained her "aggravation" theory during redirect. She said, "[T]he fact that he is having problems that exist now that didn't exist before he had his work at Kaiser leads me to think that there was some aggravation of these preexisting conditions as a result of his workplace." (Tr. at 3083.)

As she had with respect to Dan Glass and David Schudel, Dr. Lantsberger testified that Thompson had experienced an alteration of consciousness while working at Kaiser. (Tr. at 3098.) However, she made no effort to link Thompson's alteration of consciousness with her prior diagnosis.

(e) First Recross

During recross, Dr. Lantsberger repeatedly asserted that Thompson's condition had been "aggravated" by work at Kaiser. In each instance, she was confronted with strikingly inconsistent deposition testimony. See, e.g., Tr. at 3164 ("headaches he complained of in 1989 were different in frequency and severity and were most likely not related to the headaches that he was experiencing while he was on the job site"); Tr. at 3165 (possible that memory loss was due to industrial exposure, but not probable).

4. Tim Schudel

Dr. Lantsberger was the only expert to testify on Tim Schudel's behalf. While on the stand, she listed the various symptoms he had reported to her. However, when it came to the question of causation, her testimony was quite tentative.

(a) Direct Examination

Dr. Lantsberger was asked whether she had "an opinion based upon reasonable medical probability as to whether there's any relationship between Tim Schudel's lung problems and memory problems and his exposure to the chemicals in 1988?" (Tr. at 1885.) She responded in the following manner, "He indicated to me that he hadn't had any problems with memory or concentration or breathing problems prior to this employment on the job site." Id.

Shortly thereafter, Dr. Lantsberger was again asked whether she had "an opinion as to whether there's any relationship between Mr. Tim Schudel's long problems and his memory problems and the exposure to the chemicals in 1988?" (Tr. at 1888.)

She said, "Mr. Schudel had indicated to me in his history and through the testing process that he had not had any problems with his lungs nor any problems with his memory prior to being exposed in 1988." Id.

Plaintiffs' counsel followed up by asking, "So is there a relationship there?" Id. To which Lantsberger replied, "I believe so." Id.

(b) Cross-examination

Dr. Lantsberger acknowledged that although Mr. Schudel "needed to have a pulmonary work-up by a pulmonologist," Tr. at 2841, "[w]e never did get him in to see one." Id.

Mr. Tim Schudel was examined by psychologist Lloyd Cripe. Dr. Cripe asked that Mr. Schudel be informed "that there is no clear indication that his brain has been damaged as a result of his exposure." (Tr. at 2847.) Cripe went on to say, "While it is possible that his previous learning disabilities have been exacerbated or strained in some manner, it is not possible in a medical/legal manner to be reasonably certain that he has suffered any kind of appreciable brain dysfunction related to the industrial toxic exposure." Id.

After being counseled regarding Dr. Cripe's report, Schudel made no further complaints regarding memory loss. (Tr. at 2850.)

(c) Redirect

Dr. Lantsberger testified that Tim Schudel experienced an "alteration of consciousness" while exposed to chemicals at Kaiser. (Tr. at 3097.) As with the other workers, no effort was made to link that opinion to a specific diagnosis.

With respect to her "aggravation" opinion, Dr. Lantsberger said, "In relationship to him as a whole person in the totality of the information that was supplied to me, as a whole, I think that his condition was, on a more probable than not basis, an aggravation of his preexisting conditions." (Tr. at 3140.)

5. Kathrene Froese

Two experts testified regarding Ms. Froese's specific complaints. One was Dr. Jonathan Ostrow. The defendants concede that he "opined with reasonable medical probability that Ms. Froese [has] irritant-induced Reactive Airways Dysfunction Syndrome." (Defendants' Memorandum in Support of Renewed

Motion at 76.)

The other expert to testify regarding Ms. Froese's complaints was Dr. Lantsberger. She mentioned a number of non-respiratory problems, including rash (Tr. at 1846-48), memory loss (Tr. at 1851, 1862-64), headaches (Tr. at 2772-73), and "whole person" aggravation (Tr. at 3144.)

(a) Direct examination of Dr. Lantsberger

Ms. Froese told Dr. Lantsberger that she had developed a rash while working at Kaiser. (Tr. at 1846.) According to Ms. Froese, the rash appeared on those portions of her body that were most exposed to the cleaning agents she was using. (Tr. at 1846—47). Although Dr. Lantsberger implied that the cleaning agents caused the rash, she was never asked whether she had an opinion on that matter.

Dr. Lantsberger testified that Ms. Froese complained of memory "difficulties." (Tr. at 1862.) She acknowledged, however, that "we never were able to do full neuropsychological testing on her." Id.

Plaintiffs' counsel did not ask Lantsberger whether Froese's reported memory difficulties were related to her work at Kaiser. Plaintiffs' counsel did ask, however, whether it is "harder to show by objective test" that a person who is not very bright has "been injured by exposure to chemicals." Id. Lantsberger said that it was, clearly implying that the jury could find organic brain damage notwithstanding the absence of neuropsychological testing. (Tr. at 1862-64.)

(b) Cross-examination of Dr. Lantsberger

On cross, Dr. Lantsberger was asked whether she would agree that the headaches which Ms. Froese complained of in 1989 were unrelated to work at Kaiser. Lantsberger equivocated, saying, "Other than the fact that Ms. Howell indicated that since the time that she worked there she's had persistent headaches. In relationship to the fact that a significant number of the coworkers complained of this, which means specific etiology causing an infectious relationship, no, I can't do that." (Tr. at 2772-73.)

When defense counsel pressed for a more concise answer, Lantsberger replied, "As a specific sole cause, no." (Tr. at 2773.)

Later, Dr. Lantsberger was asked by defense counsel whether Ms. Froese had experienced an alteration of consciousness during the cleanup. (Tr. at 2828.) In response,

Lantsberger testified that Froese "had commented that she had problems with headaches." (Tr. at 2829.) That led to the following exchange:

"Was a headache an alteration of consciousness," defense counsel wanted to know?

"It's a neurologic symptom," Lantsberger replied.

But "[I]s it an alteration of consciousness," defense counsel asked?

"Technically of consciousness, no," Lantsberger said. Id.

(c) Redirect examination of Dr. Lantsberger

On redirect, Lantsberger reversed her position on alteration of consciousness. With respect to that phenomenon, she now said, "That's often one of the symptoms of the chemical that is affecting the brain is by giving headaches." (Tr. at 3092.)

After soliciting that statement, counsel for the plaintiffs asked, "Did you take into account her alteration in level of consciousness and her low intellect in forming your opinions as to Kathrene Froese?" Id.

"Yes," Lantsberger replied, "I did." Id.

At that point, plaintiffs' counsel broke off her line of questioning. Although she suggested that she would "come back to that," she never asked Lantsberger whether Froese's alteration of consciousness caused a specific injury.

The final issue addressed on redirect was that of "aggravation." Counsel for the plaintiffs asked, "Would you please tell the jury if you have an opinion, based upon reasonable medical probability, s to Kathrene Howell Froese as a whole person in relationship to her condition and her exposure to the chemicals at the 1988 clean-up at the Kaiser Trentwood plant?" (Tr. at 3144.)

After an objection, Lantsberger responded by saying, "As I had indicated, I have to look at these people as a total. And I have to look at all of the information as an aggregate. And as a result of putting all of the information together, I believe that the problems that she is experiencing are an aggravation of her preexisting condition. Aggravated as a more probable than not cause from her exposure."" Id.

6. Merlin Carlson

Two experts analyzed the symptoms that Merlin Carlson reported. One was Dr. Daniel Goldstein. Although the defendants challenge the admissibility of his testimony on a number of other grounds, they concede that he testified – on a more probable than not basis – that Mr. Carlson sustained brain damage due to solvent exposure. (Defendants' Memorandum in Support of Renewed Motion at 82.)

The other expert who analyzed Mr. Carlson's symptoms was Dr. Lantsberger. Not only did she testify about respiratory problems (Tr. at 1922-23, 1925-26), but she also testified about fatigue, headaches, "overall body pain," and "whole person" aggravation. (Tr. at 1926, 3143.)

(a) Direct examination of Dr. Lantsberger

On direct, Dr. Lantsberger was asked whether she had an opinion regarding the cause of Mr. Carlson's "problems with breathing." (Tr. at 1925.) She said that she had reached the "same conclusion" with respect to his "breathing problems" that she had reached with respect to his "brain injuries," namely, "[t]hat he has a similar pattern as the other coworkers, and that the overall epidemilogical data leads me to believe that his exposure in the work site is the joining factor of all of the physical problems." (Tr. at 1926.)

Next, Dr. Lantsberger was asked whether there was a relationship between Carlson's complaints of "fatigue, headache, [and] overall body pain" and "exposure to chemicals in 1988." Id. She replied, in part, "The other coworkers complaining of the same, similar respiratory, cognitive, joing and body aches, leads me to assume based on epidemiological look at the exposure, the symptoms beginning about he same time frame and continuing subsequently leads me to believe that they are associated with the exposure." (Tr. at 1926-27.)

(b) Cross-examination of Dr. Lantsberger

Dr. Lantsberger acknowledged that it was during August, 1991, that she last made a note regarding Carlson's complaint if of breathing problems. (Tr. at 2935.) She further acknowledge that Carlson does not have Reactive Airways Dysfunction Syndrome, (Tr. at 2935), and that she has never diagnosed asthma. Id.

With respect to "bone pain and joint aches," she said, "I don't know what caused these guys to have the aches and pains,

but I do now that a significant number of the workers did have them." (Tr. at 2936.)

(c) Re-direct examination of Dr. Lantsberger

Dr. Lantsberger denied that it made sense to look at Merlin Carlson in terms of "isolated incidences [sic]." (Tr. at 3142-43.) Over objection, she testified, "In terms of his entire exposure, his preexisting as, as a consequence of his exposure, I think that his preexisting problems were aggravated by his exposure at Kaiser on a more probable that not basis." (Tr. at 3143.)

7. Deborah Williams

A number of experts testified for Ms. Williams, including Drs. Lantsberger, Morton and Keppel. Although much of Dr. Lantsberger's testimony may be construed as foundation for opinions given by other experts, she was asked to render opinions of her own. For example, during redirect, she reiterated her theory of aggravation, saying, "I think in terms of Debbie, again, . . . taking it in totality, that on a more probable than not basis, I think that her conditions as we have outlined them have been aggravated by her exposure at, by her work at the Kaiser plant." (Tr. at 3145.)

8. Ruth Hopkins/John Hopkins

The defendants concede that the Hopkins' principal claims involved respiratory injuries. The defendants argue, however, that the Hopkins also maintained a claim for brain damage. The record reflects the following concerning the defendants' contention:

During direct examination, Dr. Samuel Milham was asked by counsel for the Hopkins to read the conclusion of a study to the jury. Milham relied, in part, "[T]he severe neurologic injuries suffered by the workers in the incident are sobering reminders that easily preventable organic solvent related occupational illness continues to occur in a highly developed country in the late 20th century." (Tr. at 1436.) (Emphasis added.)

In addition, the Hopkins' attorney participated actively in the cross-examination of Dr. Neil Rosenberg, the defendant's expert on the subject of solvent-induced organic brain damage. (Tr. at 9473-89, 9529-40.) He questioned Rosenberg about neurologic injury in general, (see, e.g., Tr. at 9481-82), and Mrs. Hopkins' case in particular--including magnetic resonance

imaging ("MRI".) (Tr. at 9538-39.) He also had Rosenberg confirm that his testimony had nothing to do with the "pulmonary aspect of this case." (Tr. at 9540.)

During closing, the Hopkins' attorney devoted most of his time to pulmonary complaints. He did not restrict himself to that subject, however. For example, he asked the jury to think about Ruth Hopkins' "memory problems." (Tr. at 12022.) Later, he said, "These chemicals can hurt you. They can hurt your organs. They can hurt your brains." (Tr. at 12028.)

It was at this point that he asked the jury to discount Dr. Rosenberg's testimony about magnetic resonance imaging and Toluene abusers. In essence, he argued that his clients' exposure to organic solvents was distinguishable from that of the Toluene abusers Dr. Rosenberg had described, thereby implying that it was of no significance that Mrs. Hopkins's MRI was normal. (Tr. at 12028-29.)

D. Sufficiency of Certain Expert Opinions (Analysis)

A motion for judgment as a matter of law may be granted when "a party has been fully heard with respect to an issue and there is no *legally sufficient evidentiary basis for a reasonable jury to have found for that party* with respect to that issue . . . ." Fed.R.Civ.P. 50(a)(1). See Montiel v. City of Los Angeles, 2 F.3d 335, 342 (9th Cir.1993). The moving party must demonstrate that insofar as the verdict is concerned, the evidence permits but one reasonable conclusion. Conner v. Sakai, 15 F.3d 1463, 1467 (9th Cir.1993).

1. Dan Glass

Dr. Lantsberger examined Mr. Glass on three occasions. The first examination occurred during October, 1989; the second during May, 1990; and the third during September, 1991. Mr. Glass did not report respiratory problems on those occasions, nor did Dr. Lantsberger diagnose pulmonary injury or disability. Given the record as it now exists, a reasonable jury could not have found for Mr. Glass on that issue.

With respect to Mr. Glass' heart palpitations, Dr. Lantsberger could only say that they may have been related to his industrial exposure. Testimony of that sort is legally insufficient. Under Washington law, an opinion that a "physical disability 'might have' or 'possibly did' result from the hypothesized cause" is nothing more than conjecture. O'Donoghue v. Riggs, 73 Wn.2d

814, 824, 440 P.2d 823 (1968). "To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of 'probably' or 'more likely than not' caused the subsequent disability." Id.

Regarding headaches and memory loss, Dr. Lantsberger was forced to concede that she had been unable to find a cause-and-effect relationship between Glass' participation in the Kaiser cleanup and his subsequent complaints. Thus, her testimony concerning those conditions falls short of the O'Donoghue standard.

Dr. Lantsberger attempted to bridge that causal gap by suggesting that Glass' "whole person" had been "aggravated." However, after Daubert and Claar, it is difficult to see how Lantsberger's fall-back theory can be considered "scientific knowledge." If none of Glass's specific symptoms can be linked to the cleanup on a more-probable-than-not basis, how is it possible that his whole person was aggravated?

It is the plaintiffs' burden to demonstrate that Dr. Lantsberger arrived at her conclusions "using scientific methods and procedures," and that her "conclusion [are] not mere subjective beliefs or unsupported speculation." Claar, 29 F.3d at 502. Insofar as Lantsberger's aggravation theory is concerned, the plaintiffs have failed to satisfy that requirement.

In conclusion, a reasonable jury could not have found for Glass on any of his claims. Dr. Lantsberger's causation testimony was legally insufficient, and her aggravation theory is not scientific knowledge.

2. David Schudel

It is undisputed that Mr. Schudel did not sustain neurologic injury as a result of his participation in the Kaiser cleanup. A reasonable jury could not have found for him on that issue. Similarly, although Dr. Lantsberger suggested that Schudel's exposure to chemicals caused actual pulmonary injury, she could say only that his "lung condition" was "related to his exposures." Given Lantsberger's uncertainty, a finding for Schudel on a claim of actual pulmonary injury would have been nothing more than speculation. O'Donoghue, 73 Wn.2d at 824.

Two possibilities remain. One is that Mr. Schudel has developed a conditioned response to chemicals as a result of

working at Kaiser. The other is that his whole person was aggravated. The latter has already been discussed. It is not sound science. With respect to the former (i.e., conditioned response), there are two serious questions. First, is Dr. Lantsberger qualified to render an essentially psychiatric opinion? Second, is there anything in the record to indicate that her opinion reflects scientific knowledge?

It is clear from Dr. Lantsberger's testimony that David Schudel's response to odors is psychological in nature. Notwithstanding its psychological nature, plaintiffs' counsel made no effort to show that Dr. Lantsberger is qualified to diagnose or treat psychological disorders. Indeed, she freely admitted that she is not an expert in psychiatry. (Tr. at 2337.)

Even if Dr. Lantsberger was qualified to render a psychiatric opinion of the sort she gave here, plaintiffs' counsel failed to establish that Lantsberger's conclusion reflects sound science. Not one journal article was offered in support of Dr. Lantsberger's opinion, nor was an effort made to satisfy any of the other Daubert criteria. As a result, Dr. Lantsberger's opinion fails to pass Rule 702 muster.

3. Craig Thompson

Dr. Lantsberger failed to link any of Mr. Thompson's specific complaints to the Kaiser project on a more-probable-than-no basis. Her fall-back was "aggravation," a theory which does not meet the standards for admissibility established by Rule 702. It follows that the jury's verdict in Mr. Thompson's favor was based upon speculation, nothing more.

4. Tim Schudel

Dr. Lantsberger acknowledge that Mr. Schudel "needed to have a pulmonary work-up by a pulmonologist," but that she "never did get him in to see one." Notwithstanding the absence of expert pulmonological evidence, Lantsberger suggested that Schudel developed respiratory problems as a result of his exposure to "chemicals." In that regard, however, she could say only that he told her that he had not had problems before Kaiser and that he did have problems after Kaiser.

That Mr. Schudel's symptoms appeared after he worked at Kaiser may establish a temporal link between work and symptoms, but it does not establish a causal link. See Rohrbough v. Wyeth Laboratories, Inc., 916 F.2d 970, 974 (4th Cir.1990)

(mere fact that a child suffered seizures after receiving a vaccination insufficient to establish causation). Dr. Lantsberger's testimony on that point is therefore insufficient.

Tim Schudel obtained neuropsychological testing. While the psychologist report that it was possible that Schudel's previous learning disabilities had been aggravated, he could not say that aggravation was reasonably certain. Indeed, as soon as Schudel was counseled regarding the report's findings, he quit complaining of memory loss. Given those undisputed facts, a reasonable jury could not have found for Mr. Schudel on the question of neurological injury.

That leaves Dr. Lantsberger's aggravation theory. It is neither scientifically nor causally sufficient to suport the jury's verdict.

5. Kathrene Froese

A reasonable jury could have found for Ms. Froese on her respiratory claim. Were that her only claim, no further discussion would be necessary. However, it was not. Dr. Lantsberger was asked to testify regarding Ms. Froese's complaints of rash, memory loss, and headaches. With respect to these symptoms, Dr. Lantsberger was either never asked about a causal relationship, or if she was, her testimony fell short of the O'Donoghue standard.

6. Merlin Carlson

Mr. Carlson's principal claim was for toxic encephalopathy. He did not stop there, however. Dr. Lantsberger reported breathing problems, fatigue, headaches, and "overall body pain."

With respect to respiratory complaints, Dr. Lantsberger was forced to concede that Mr. Carlson does not have Reactive Airways Dysfunction Syndrome or industrially induced asthma. Similarly, with respect to "bone pain and joint aches," she could only say, "I don't know what caused these guys to have the aches and pains, but I do know that a significant number of the workers did have them." Given the record, a reasonable jury could not have found for Mr. Carlson on his non-neurological claims.

7. Deborah Williams

Ms. Williams presented claims for organic brain damage and respiratory injury. A number of experts testified on her behalf. Although Dr. Lantsberger opined that Ms. Williams'

"conditions" were aggravated by work at Kaiser, it is questionable whether her testimony would have had appreciable impact on the jury's verdict.

8. Ruth Hopkins/John Hopkins

Based upon the evidence presented by the Hopkins, their cross-examination of Dr. Rosenberg, and the manner in which they argued their case, a reasonable jury would have assumed the Hopkins were making a claim for brain damage. Granted, the jury may not have viewed it as the Hopkins' principal claim, both the jury would have understood that it was a very real part of the Hopkins' case. Therein lies the problem. Having chosen to make a claim for solvent-induced brain damage, the Hopkins were obligated to prove it. They failed to do so. A reasonable jury could not have found that the Hopkins suffered neurologic injuries as a proximate cause of the defendants' negligence. The defendants are therefore entitled to judgment as a matter of law on that particular claim.

E. Sufficiency of Certain Expert Opinions (Conclusion)

In view of the foregoing, the defendants are entitled to judgment as a matter of law on a number of claims. They include the following: all claims asserted by Dan Glass, David Schduel, Craig Thompson and Tim Schudel; all non-respiratory claims asserted by Kathrene Froese; all non-neurological claims asserted by Merlin Carlson; and all non-respiratory claims asserted by the Hopkins.

Although several claims must be dismissed, several remain. The next question is whether a new trial is necessary.

Approximately six weeks prior to trial, the Court asked the plaintiffs to list their claims against the defendants. (Order Re Daubert Procedure (Ct. Rec. 326) at 7.) The plaintiffs declined to do so. (Plaintiffs' Lists of Claims (Ct. Rec. 334).) Instead, they presented the jury with a long list of symptoms, only some of which could be connected to the plaintiffs' work at Kaiser on a more probable than not basis. Furthermore, when it came time to instruct the jury, the plaintiffs rejected a suggestion that the jurors be asked to decide specific claims.

The plaintiffs' choice of tactics has placed the Court in an awkward position. Because the jurors were not asked to return verdicts with respect to each plaintiff's individual claims, it is now impossible to separate the wheat from the chaff. Thus, the Court

is forced to conclude that the verdicts in favor of Kathrene Froese, Merlin Carlson, Ruth Hopkins and John Hopkins are too tainted to stand. For that reason, the plaintiffs' remaining claims must be re-tried.

III. DEFENDANTS' MOTION FOR NEW TRIAL

The defendants give twelve reasons why the Court should order a new trial. Fed.R.Civ.P. 59. They include the following: First, by urging the jury to "send a message" to the defendants, the plaintiffs injected irrelevant, arbitrary, and punitive considerations into the jury's deliberations. Second, the Court failed to instruct the jury on Washington's medical causation standard. Third, the Court's instructions with respect to state and federal safety regulations were in error. Fourth, the Court failed to instruct the jury on the limited duties of the employer of an independent contractor. Fifth, the plaintiffs violated a pretrial order by introducing evidence regarding Daniel Skeman. Sixth, the Court applied Bryan v. John Bean, 566 F.2d 541 (5th Cir.1978), in an improper manner. Seventh, the defendants should have been allowed to cross-examine the plaintiffs regarding inconsistent statements made to Diane Nebel. Eight, the plaintiffs should not have been allowed to offer evidence regarding symptoms experienced by non-plaintiff workers. Ninth, the plaintiffs were permitted to suggest that a defense expert had no basis for opining that Mrs. Hopkins's depression had a cause other than that suggested by her experts. Tenth, the jury's verdict was against the weight of the evidence. Eleventh, the damages awarded were excessive both as a matter of fact and a matter of law. Twelfth, the defendants' right to cross-examination was violated.

Given the Court's various rulings with respect to the defendants' motion for judgment as a matter of law, the defendants' alternative request for a new trial is moot with respect to all but Deborah Williams. Insofar as she is concerned, the defendants' motion is denied.

IV. PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS

On July 22, 1994, the plaintiffs filed a timely request for attorneys' fees, together with a request for costs beyond those normally awarded to prevailing parties. Fed.R.Civ.P. 53(d). The defendants have objected to both.

Since then, the Court has granted the defendants' Rule 50(b) motion in substantial part, dismissing a number of the plaintiffs' claims. Only the verdict in favor of Ms. Williams remains intact. However, because it does, she may be entitled to fees and costs.

The Court has two options concerning Ms. Williams's request. It can defer ruling until after the appellate process has run its course, or it can decide the matter of fees and costs at this juncture. Fed.R.Civ.P. 58 advisory committee's note (1993 amendment).

The latter is the best course. This lawsuit has generated a number of complex legal questions, among them whether Ms. Williams is entitled to fees and costs. Instead of presenting them to the Court of Appeals piecemeal, it is best to resolve as many as possible now so that they may be reviewed together. Id. ("in many cases it may be more efficient to decide fee questions before an appeal is taken").

One final issue must be addressed before turning to the merits of Ms. Williams's request- -the matter of the Court's jurisdiction. As the advisory committee noted, post-trial fee requests can create complicated jurisdictional questions. To avoid them, Rule 58 permits a district court to treat a request for fees as a Rule 59 motion and extend the time for appeal from the underlying judgment. Fed.R.Civ.P. 58. It is appropriate to do so here, and the Court so orders.

A. Attorneys' Fees

Ms. Williams submits that her request for fees may be granted under either of two theories. One is based upon state law, the other upon federal law. The two theories will be examined separately.

(a) State Law

When a request for attorneys' fees is made in a diversity action, and the request arises from the substance of a state-law claim, the

request is governed by the law of the forum state. Price v. Seydel, 961 F.2d 1470, 1475 (9th Cir.1992). Washington follows the "American Rule." Dayton v. Farmers Insurance Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). According to that rule, a court has not power to award attorney fees as a cost of litigation absent a contract, a statute, or some recognized principle in equity. Id. Here, there is neither a contractual nor an equitable basis for awarding fees. If Ms. Williams is to recover attorneys' fees, she must cite a statute which authorizes them. She attempts to do just that.

According to Ms. Williams, the defendants violated the Washington Industrial Safety and Health Act ("WISHA")[14] by failing to provide adequate warnings regarding the solvents used in the cleanup. She does not assert that the defendants are liable for fees under WISHA , however. Instead, she argues that the defendants are liable for attorneys' fees under one of three entirely separate statutes- - the Worker and Community Right to Know Act.,[15] the Hazardous Waste Management Act,[16] or the Model Toxics Control Act.[17]

Although ingenious, Ms. Williams's state-law theory is without merit. First, the jury did not find that the defendants violated either WISHA or any regulation promulgated thereunder. Thus, there would appear to be no basis for Ms. Williams's assertion that the defendants violated that statute. Second, while it is true that the Worker and Community Right to Know Act, the Hazardous Waste Management Act, and the Model Toxics Control Act authorize fees in certain limited situations, there is nothing in them to suggest that their (respective) fee provisions can be invoked based upon a violation of an entirely separate statute. See, e.g., RCW 49.70.150 (a civil action may be brought to "compel compliance with the provisions of this chapter or any rule promulgated under this chapter"); RCW 70.105.097 (a "person injured as a result of a violation of this chapter or the rules adopted thereunder may bring an action . . ."); RCW 70.105D.00 ("a person may bring a private right of action . . . for the recovery of remedial action costs"). Finally,

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[14] RCW Chapt. 49.17.
[15] RCW Chapt. 49.70
[16] RCW Chapt. 70.105.
[17] RCW Chapt. 70.105D.

neither Ms. Williams nor any of the other plaintiffs included the matter of attorneys' fees in the pretrial order. See Price Dev. Co. v. Redevelopment Agency, 852 F.2d 1123, 1128 (9th Cir.1988) (denying request for fees where pretrial order contained no indication that parties would be seeking fees).

(b) Federal law

Ms. Williams also seeks fees under 28 U.S.C.§ 1927. That statute provides that an "attorney . . . who so multiplies the proceedings . . . unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Without question, the attorneys for the defendants mounted a very aggressive defense on behalf of their clients. There is no evidence, however, that they acted in bad faith. For that reason, § 1927 is inapplicable here. See MGIC Indem. Corp. v. Moore, 952 F.2d 1120, 1122 (9th Ciri.1991) (§1927 requires a finding of bad faith).

B. Costs

In light of the Court's prior rulings, it is clear that Ms. Williams will need to revise her request for costs. She should consider the following in doing so:

Ms. Williams asked for expert witness fees. Since none of her witnesses were court-appointed, she is limited to the sums authorized by 28 U.S.C. § 1821. See Association of Flight Attendants v. Horizon Air, 976 F.2d 541, 551-52 (9th Cir.1992).

Ms. Williams seeks reimbursement for obtaining copies of depositions. Although district courts have the authority to tax such costs, Alflex Corporation v. Underwriters Laboratories, 914 F.2d 175, 177 (9th Cir. 1990), cert. denied, ___ U.S. ___, 112 S.Ct. 61, 116 L.Ed.2d 36 (1991), the exercise of that discretion is often guided by local rule. In this district, "[s]tenographic fees for depositions may be allowed only when the deposition is used at trial or hearing for substantive, as opposed to impeachment purposes. Only the original deposition shall be taxed." Local Rule ("LR") 54(f) (2).

In addition, Ms. Williams may be asking for other costs associated with the taking of depositions. If so, she must demonstrate that the costs were necessarily incurred. See Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1438-39 (9th Cir.1993).

Finally, Ms. Williams seeks compensation for expenses

assumed in obtaining daily transcripts of court proceedings. Because of the length and complexity of the case, Ms. Williams is entitled to an award of costs for those portions of the daily transcript necessary for presentation of her claims. See Independent Iron Works, Inc. v. United States Steel Corporation, 322 F.2d 656, 678 (9th Cir.) (trial transcripts were reasonably necessary given the complexity and length of proceedings), cert. denied, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963).

V. MOTION TO AMEND VERDICT

Kaiser Aluminum and Chemical Corporation is one legal entity; Kaiser Aluminum Corporation is another. Since at least October, 1991, it is Kaiser Aluminum and Chemical Corporation which has been one of the two named defendants in this action.

The jury returned its verdict on July 13, 1994. Judgment was entered that same day. The judgment refers to Kaiser Aluminum Corporation, not Kaiser Aluminum and Chemical Corporation.

Defendant Kaiser Aluminum and Chemical Corporation now moves the Court, pursuant to Rule 60, to amend the judgment to reflect its true name. The plaintiffs do not object.

Kaiser aluminum and Chemical Corporation is correct. The wrong corporate entity was listed in the judgment. As a result, its motion will be granted and the judgment modified accordingly.

VI. MOTION TO SET DISCOVERY HEARING

The Plaintiffs move the Court to set a hearing to investigate their allegations that the defendants abused the discovery process. No authorities have been cited in support of this request.

Given the Court's previous rulings, the plaintiffs' motion is (at best) premature. Consequently, their motion will be denied.

VII. MOTION TO STAY EXECUTION OF JUDGMENT

The defendants move the Court to stay any proceedings to enforcement the judgment pending resolution of their post-trial motions. Fed.R.Civ.P. 62(b). With entry of this order, the defendants' request becomes moot. It will therefore be denied.

IT IS HEREBY ORDERED:

1. The plaintiffs' motion to strike defense motions as untimely **(Ct. Rec. 536)** is **denied.**

2. The defendants' motion to strike plaintiffs' memorandum **(Ct. Rec. 565)** is **denied.**

3. The plaintiffs' motion to strike reply **(Ct. Rec. 552)** is **denied.**

4. The defendants' motion for judgement as a matter of law **(Ct. Rec. 488)** is **denied** in part and **granted** in part. The judgments entered herein are re-opened and modified as follows:

(a) The defendants are granted judgment as a matter of law on all claims asserted by Dan Glass, David Schudel, Craig Thompson and Tim Schudel. Those claims are dismissed with prejudice.

(b) The defendants are granted judgment as a matter of law on all non-respiratory claims asserted by Kathrene Froese. Those claims are dismissed with prejudice.

(c) The defendants are granted judgment as a matter of law on all non-neurological claims asserted by Merlin Carlson. Those claims are dismissed with prejudice.

(d) The defendants are granted judgment as a matter of law on all non-respiratory claims asserted by Ruth Hopkins and John Hopkins. Those claims are dismissed with prejudice.

5. The defendants are granted a new trial on all remaining claims.

6. The defendants' motion for new trial or alternative relief **(Ct. Rec. 486)** is **denied**.

7. The plaintiffs' timely request for attorneys' fees and costs shall have the same effect under Fed.R.App.P. 4(a)(4) as a Rule 59 motion, and the period for filing a notice of appeal shall be extended accordingly.

8. The plaintiffs' request for attorneys' fees and costs is **denied** in part and **granted** in part. Ms. Deborah Williams is directed to submit a revised cost bill.

9. Defendant Kaiser Aluminum and Chemical Corporation's motion to amend or correct judgments **(Ct. Rec. 513)** is granted. The judgments entered herein shall refer to "Kaiser Aluminum and Chemical Corporation," not "Kaiser Aluminum Corporation."

10. The plaintiffs' motion for order shortening time **(Ct. Rec. 555)** is **denied**.

11. The plaintiffs' motions for order setting hearing on discovery abuses **(Ct. Recs. 534 and 563)** are **denied**.

12. The defendants' motion for stay of proceedings to enforce judgments **(Ct. Rec. 490)** is **denied.**

IT IS SO ORDERED. The Clerk is hereby directed to file this order, enter judgment accordingly, and furnish copies to counsel.

DATED this 22 day of November 1994.

s/_____
FRED VAN SICKLE
United States District Judge

FILED IN THE
US DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
JAN 17 1995
JAMES R. LARSEN, CLERK
_____DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et. al., et. ux., Plaintiffs, v. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM CORPORATION, Defendants.	NO. CS-92-081-FVS ORDER RE MOTIONS TO AMEND AND CERTIFY

BEFORE THE COURT are motions to amend Order Re Post-Trial Motions,[18] and to authorize appeals from it. All motions were heard without oral argument on January 13, 1995.

CLAIM OF SANDRA SCHUDEL

Relief Requested

Mr. Timothy Schudel alleged that he suffered various injuries while working on the Kaiser cleanup project. His wife, Sandra Schudel, brought separate claims for loss of consortium based upon the injuries her husband allegedly suffered. Mrs. Schudel's loss-of-consortium claims were not addressed in the Order Re Post-Trial Motions. Now that Timothy Schudel's claims have been dismissed with prejudice, the defendants move the Court to dismiss Sandra Schudel's loss-of-consortium claims.

Ruling

The defendant's motion to amend (Ct. Rec. 574) is granted. Ms. Sandra Schudel's claims against the defendants will be dismissed with prejudice.

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[18] The order was entered on November 25, 1994. It is docketed as pleading 571.

MOTION FOR NEW TRIAL

Relief Requested

After the jury returned its verdicts, the defendants moved for a new trial (Ct. Rec. 486). Except in the case of Deborah Williams, the Court did not address the merits of the defendants' motion. (In her case, the defendant's motion was denied.) The defendants now move the Court, pursuant to Fed.R.Civ.P. 50(c)(1), to issue a conditional ruling with respect to the other plaintiffs.

Ruling

The defendant's motion for new trial will be denied with respect to all plaintiffs.

HOPKINS' MOTION TO RECONSIDER

Relief Requested

Plaintiffs Ruth Hopkins and John Hopkins move the Court to reconsider its decision vacating the verdicts in their favor and ordering a new trial. If the Court declines to do so, Ruth Hopkins moves the Court to clarify its order regarding her claims. She notes that the Order Re Post-Trial Motions dismisses all non-respiratory claims. She wants to know whether the Court intended to preclude her from recovering for depression (allegedly) spawned by her respiratory problems.

Ruling

The Hopkins' motion for reconsideration (Ct. Rec. 580) is denied except with respect to Ruth Hopkins's request for clarification of the Court's ruling regarding recovery of damages for depression. If, upon retrial, Ruth Hopkins proves that she suffered depression as a result of respiratory problems caused by the defendants, she may recover damages for her depression.

RULE 54(b)

Relief Requested

Both sides move the Court to authorize appeals of the judgments adjudicating the claims of Deborah Williams, Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra

Schudel. Fed.R.Civ.P. 54(b) (1994).[19] In addition, plaintiffs Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins move the Court to permit them to appeal the order granting a new trial.

Analysis

Under Rule 54(b), the Court must first determine whether a final judgment exists. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7, 100 S.Ct. 1460, 1464, 64 L.Ed.2d 1 (1980). Once that task has been completed, the Court must decide whether there is any just reason to delay the appellate process. Id. at 8, 100 S.Ct. at 1465. In doing so, the Court must consider both the administrative impact of releasing claims for appeal, and "the equities involved." Id. at 8, 100 S.Ct. at 1465.

1. Existence of final judgments

The claims of ten plaintiffs are at issue in this action. Now that the Court has entered its Order Re Post-Trial Motions, the claims of Deborah Williams, Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel have been fully adjudicated. What of the claims of Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins?

In its order, the Court ruled that these four plaintiffs (i.e., Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins) could not recover damages for certain (alleged) injuries. The judgments which had been entered in their favor were vacated, and a new trial was ordered. In other words, the order limited damages, but left their negligence claims otherwise unresolved pending a new trial. As a result, insofar as Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins are concerned, the order is not a final judgment. See Arizona State Carpenters Pension Trust Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir.1991) (holding that an order dismissing a claim for punitive damages was not final).

2. No just reason for delay

(a) Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel

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[19] Rule 54(b) states, in pertinent part, "When more than one claim for relief is presented in an action, ..., or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

The record is now complete with respect to these five claims. Nothing that might occur in district court will affect appellate review of these dismissals. It is now up to the Court of Appeals to determine whether each dismissal was proper. In doing so, the Court of Appeals will have to review each claim separately. Consequently, authorizing these five plaintiffs to appeal will not result in unwarranted duplication of appellate effort.

(b) Deborah Williams

The verdict in favor of Ms. Williams was upheld. Appellate review of that verdict will facilitate adjudication of those claims which must be retried.

3. The four remaining claims

The Court ordered a new trial with respect to the claims of Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins. An order granting a new trial is interlocutory. As a general rule, it is not appealable under 28 U.S.C. §1291. Roy v. Volkswagenwerk Aktiengesellschaft, 781 F.2d 670, 671 (9th Cir.1985); Eaton v. National Steel Products Company, 624 F.2d 863, 864 (9th Cir.1980). There is an exception to that rule, however. An order granting a new trial may be appealed if the district court no longer had jurisdiction to do so. See Eaton, 624 F.2d at 864.

Here, the plaintiffs moved to strike the defendants' post-trial motions, arguing that they were untimely. The Court denied the plaintiffs' motion, and granted post-trial relief. Should the Court of Appeals disagree with this Court's assessment of the timeliness of the defendants' post-trial motions, the Court of Appeals will have to determine whether this Court had authority to enter its Order Re Post-Trial Motions. Thus, the Eaton exception applies.

Ruling

There is no just reason to delay appeal of the Order Re Post-Trial motions.

COST BILLS

Plaintiff Deborah Williams has submitted a revised cost bill. No objections have been filed. Ms. William's request will therefore be approved.

The defendants are now the prevailing parties with respect

to the claims asserted by Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel. The defendants move the Court (Ct. Rec. 274) for an order indicating that they have ten days from Rule 54(b) certification to file cost bills. Their request will be granted.

IT IS HEREBY ORDERED:

1. The defendants' motion to amend (Ct. Rec. 574) is granted. Ms. Sandra Schudel's claims against the defendants are dismissed with prejudice.

2. The defendants' motion for a conditional ruling (Ct. Rec. 574) is granted in part. The defendants' prior motion for a new trial (Ct. Rec. 486) is denied with respect to all plaintiffs.

3. The Hopkins' motion for reconsideration (Ct. Rec. 580) is denied except as indicated above.

4. The parties respective motions for Rule 54(b) certification (Ct. Recs. 574, 577) are granted.

(a) There is no just reason to delay appellate review of the Court's Order Re Post-Trial Motions (Ct. Rec. 571); and

(b) Since the Clerk has already entered judgment as directed by the Order Re Post-Trial Motions, that judgment (Ct. Rec. 572) will become the final judgment for purposes of Rule 54(b) upon entry of this order.

5. Deborah Williams's cost bill is approved.

6. The defendants are to submit a cost bill with respect to the claims of Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel within ten days of entry of this order.

7. Any other pending motions are denied as moot.

IT IS ORDERED. The Clerk is hereby directed to file this order, furnish copies to counsel, and close the case.

DATED this 13 day of January 1995.

s/
FRED VAN SICKLE
United States District Judge

FILED
MAR 24 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL, et al.,	Nos. 94-36250
	95-35010
Plaintiffs/Appellants/ Cross-Appellees,	95-35092
	95-35145
	DC# CV-92-81-FVS
vs.	Eastern Washington
	(Spokane)
GENERAL ELECTRIC COMPANY, a foreign corporation, et al.,	ORDER
Defendants/Appellees/ Cross-Appellants.	

Before: SNEED, POOLE, and BRUNETTI, Circuit Judges.

Appeal Nos. 94-36250 and 95-35010 are dismissed as duplicative. All pending motions in these appeals are denied as moot.

Appellants' motions filed in appeal No. 95-35092 to remand this case to the district court are denied without prejudice to the parties raising this or any jurisdictional issue in the briefs on the merits.

The motion of cross-appellee Deborah Williams to dismiss cross-appeal No. 95-35145 for lack of a timely notice of appeal is denied. See Fed. R. App. P. 4(a)(4).

Cross-appellant General Electric's motion to dismiss appeal No. 95-35092 for lack of jurisdiction is denied. See Freeman v. Hittle, 747 F.2d 1299, 1301-02 (9th Cir. 1984). 94-36250, 95-35010, 95-35092, 95-35145

-2-

Appellant/Cross-Appellees' motion to strike General Electric's motion to dismiss appeal No. 95-35092 is denied.

The briefing schedules previously established in appeal Nos. 95-35092 and 95-35145 respectively shall be vacated. The Clerk shall establish a new cross-appeal briefing schedule in these appeal.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL, et al.,
Plaintiffs,
and

DEBORAH GUARAGNA-WILLIAMS,
Plaintiff-Appellee,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Appellants.

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; JOHN HOPKINS; RUTH HOPKINS, husband and wife, and the marital community composed thereof,
Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Appellees.

FILED
NOV 24 1997
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

No. 95-35092

D.C. No.
CV-92-00081-FVS

No. 95-35145
D.C. No.
CV-92-00081-FVS

ORDER

Before: BROWNING, D.W. NELSON, and FERNANDEZ, Circuit Judges

The petition for rehearing of Merlin E. Carlson, Jr. is DENIED.

The panel has voted to DENY the petition for rehearing of David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, Deborah Williams, and Kathrene Froese. Judge Browning and Judge Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Nelson so recommends.

The panel has voted to DENY the petition for rehearing of John Hopkins and Ruth Hopkins. Judge Browning and Judge Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Nelson so recommends.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

FILED IN
U.S. DISTRICT COURT
EASTERN DISTRICT OF
WASHINGTON
JUL 13 1994
JAMES R. LARSEN, CLERK
_____DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife and the marital community composed thereof; KATHRENE FROESE; CRAIG A. THOMPSON; DEBORAH GUARANGA WILLIAMS; and JOHN HOPKINS and RUTH HOPKINS, husband and wife and the marital community composed thereof.	)	JUDGMENT IN A CIVIL CASE
Plaintiff (s).	)	CASE NUMBER: CS-92-0081
vs.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation.	)	
Defendant (s).	)	

This action came on for trial before the Court and a jury, Honorable Fred Van Sickle, District Judge, presiding, and the

issues having been duly tried and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED that the plaintiff, Tim Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Fifty-One Thousand Two Hundred Seventy Dollars ($1,051,270.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Sandra Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Fifty Thousand Dollars ($50,000.00) on her claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, John Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Three Hundred Forty-Eight Thousand Twenty Dollars ($1,348,020.00), with interest there on at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruth Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Six Hundred Two Thousand Two Hundred Fifty Dollars ($602,250.00) on her claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruth Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Four Hundred Four Thousand Forty Dollars ($1,404,040.00) with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, John Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Six Hundred Two Thousand Two Hundred Fifty Dollars ($602,250.00) on his claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Merlin Carlson, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Two Million Seven Hundred Seventy-Five Thousand Seven Hundred Sixty-Eight Dollars ($2,775,768.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Daniel Glass, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Nine Hundred Fifty-Six Thousand One Hundred Forty-Six Dollars ($956,146.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Deborah Guaragna Williams, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Nine Hundred Seven Thousand Seven Hundred Eighty-Three Dollars ($1,907,783.00), with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Kathrene Froese, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Four Hundred Fifty-Nine Thousand Three Hundred Thirty-Two Dollars ($1,459,332.00), with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, David Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million One Hundred Thirty Thousand Seven Hundred Eleven Dollars ($1,130,711.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action; and

IT IS ORDERED AND ADJUDGED that the plaintiff, Craig Thompson, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Five Hundred Fifty-Six Thousand One Hundred Ninety-Nine Dollars ($556,199.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action.

Dated: July 13, 1994

JAMES R. LARSEN, Clerk

by: s/_____
Charles L. Randazzo
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife and the marital community composed thereof; KATHERENE FROESE; CRAIG A. THOMPSON; DEBORAH GUARAGNA WILLIAMS; and JOHN and RUTH HOPKINS, husband and wife and the marital community composed thereof,	)	NO 92-CS-0081-FVS
Plaintiffs	)	SPECIAL VERDICT FORM MERLIN CARLSON
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	
Defendants.	)	

We, the jury, make the following answers to the questions submitted by the court on the claim of Merlin Carlson:

QUESTION NO. 1: Were either of the defendants negligent? Answer "yes" or "no" after the name of each defendant.

Answer	Yes	No
Defendant General Electric Co.	X	___
Defendant Kaiser Aluminum Corp.	X	___

If you answer Question No. 1 "no" as to both defendants sign and return this verdict. If you answer Question No. 1 "yes" as to one or both of the defendants, then answer Question No. 2.

QUESTION NO. 2: Was such negligence a proximate cause of injury to Merlin Carlson?

Answer "yes" or "no" after the name of each defendant.

Answer	Yes	No
Defendant General Electric Co.	X	___
Defendant Kaiser Aluminum Corp.	X	___

If you have answered "yes" to either defendant on Question No. 2, then answer Question No. 3. If you have answered "no" as to both defendants then sign and return this verdict.

QUESTION NO. 3: We the jury find for the plaintiff, Merlin Carlson, in the sum of $ 2,775,768.00 .

If you answer Question No. 3 with any amount of money, answer Question No. 4. If you find no damages, sign and return this verdict.

QUESTION NO. 4: Was Merlin Carlson the loaned servant of General Electric Company?

Answer "yes" or "no". NO

Sign and return this verdict.

DATED this 13TH day of July, 1994.

s/Diana Waura
Presiding Juror

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

A60-A61

APPENDIX D

U.S. CONSTITUTION AMENDMENT VII

CIVIL TRIALS

In Suits of common law, where the value and controversy shall exceed $20.00, right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONSTITUTION AMENDMENT V

[V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, of property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION ARTICLE III

§ 1. Judicial power; Tenure of office

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§ 2. Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consultants;—to all Cases of admiralty and maritime Jurisdiction;—to Conservatories between two of more States,—between a State and Citizens of another State;—between citizens of different States, between citizens of the same State claiming Lands under Grants of different States, and between a State, of the Citizens thereof, and foreign States, Citizens of Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed, but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

§ 3. Treason; proof and punishment

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted to Treason unless testimony of two witnesses to the same Act, of on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, of Forfeiture except during the Life of the Person attainted.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

. . .

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails

to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict (Pre-1991 Amendment)

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

. . .

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(1991 Amendment Version)

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993.)

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings (December 1995 Version)

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim of defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

. . .

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deter deciding the legal questions raised by the motion. The movant may renew its request for judgement as a matter of law by filing by filing a motion no later than 10 days after entry of judgement- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
  (A) allow the judgment to stand,
  (B) order a new trial, or
  (C) direct entry of judgment as a matter of law; or
(2) if no verdict was returned:
  (A) order a new trial, or
  (B) direct entry of judgment as a matter of law.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

Rule 59. New Trials; Amendment of Judgments
(1966 Version)

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

. . .

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reasons for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefore.

(e) Motion to Alter or Amend the Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1 966, eff. July 1, 1966)

Rule 59 New Trials; Amendment of Judgments (1995 Version)

. . .

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

. . .

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Apr. 27, 1995, eff. Dec. 1, 1995.)

28 U.S.C. § 2072. Rules of procedure and evidence; power to proscribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for bases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub.L. 100-702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 46-48, and amended Pub.L. 101-650, Title III, § 315, Dec. 1, 1990, 104 Stat. 5115.)

21. Facts and facts issues

Courts cannot trench on providence of jury upon questions of fact under this provision. State v. Furth (1940) 5 Wash.2d 1, 104 P.2d 925.

Right to trial by jury must mean that accused has right to have jury pass upon every substantive fact going to question of his guilt or innocence, otherwise this provision would be rendered void and utterly fail in purpose which our people have always believed it was intended to accomplish. State v. Strasburg (1910) 36 Wash. 106, 110 P. 1020, Ann. Cas. 1912B 917.

5.40.050. Breach of duty-Evidence of negligence-Negligence per se

A breach of a duty imposed by stature, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to electrical fire safety, the use of smoke alarms, or driving while under the influence of intoxicating liquor of any drug, shall be considered negligence per se.
Enacted by Laws 1986, ch. 305, § 901.

(3)
Supreme Court, U.S.
FILED
971410 FEB 23 1998
No._____ OFFICE OF THE CLERK

In The
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBBIE GUARGANA (WILLIAMS); JOHN HOPKINS; RUTH HOPKINS; husband and wife, and the marital community composed thereof,
Plaintiffs

MERLIN E. CARLSON, JR.
Plaintiff-Petitioner

v.

GENERAL ELECTRIC COMPANY, a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Respondents

On Petition for Writ Of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX VOLUME II

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Attorney for Petitioner/Counsel of Record
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1173 PP

APPENDIX E

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, March 7, 1994) (Plaintiffs' Lists Of Claims, Theories Of Liability, And Identity Of Experts Who Will Be Called)..... 71a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, June 27, 1994) (Plaintiffs' Memorandum On Potential Instructional Error By Attempting To Define Area Of Injury) 88a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (Jury Instructions (Damage)) 93a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, July 27, 1994) (Defendants' Motion For Judgment As A Matter Of Law) 99a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, July 27, 1994) (Defendants' Motion For New Trial Or Alternative Relief) 101a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, December 9, 1994) (Motion That The Order Of November 25, 1994, Is A Final Decision And There Is No Just Reason For Delay) 103a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. December 29, 1994) (Plaintiffs' Reply To Defendants' Opposition To Fed.R.Civ.P. 54(B) Language) 106a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. December 28, 1994) (Affidavit Of Marcia M. Meade In Response To Defendants' Opposition To The Frcp 54(B) Language [w/ attachments]) 113a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 31, 1995) (Brief In Support Of Motion To Dismiss) 125a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 17, 1995) (Appellant Carlson's Motion To Remand For Lack Of District Court Jurisdiction And Stay Of Schedule (Frap 9th Cir. 27.11)) 133a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 17, 1995) (Appellant Carlson's Memorandum In Support Of Remand, Reinstatement Of Verdict, And Stay Of Proceedings Under Cir. R. 27-11.) 137a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., March 7, 1995) (Appellants' Schudel, Glass, Schudel, Schudel, Howell (Froese), Thompson, Hopkins And Hopkins Motion For Remand And For Stay Of Schedule Pursuant To Circuit Rule 27.11) 151a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., February 3, 1995) (Appellant Carlson's Reply To Appellee's Memorandum In Opposition Of Remand) 158a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., February 15, 1995) (Appellants-Plaintiffs' And Appellee Guaragna's Memorandum In Opposition To Motion To Dismiss) 166a

Organic Solvent Encephalopathy: An Old Hazard Revisited. Am. J. Ind. Med., Vol. 22 (1922).....183a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. January 18, 1994) (Offer Of Proof Of Daniel Goldstein).....198a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. March 7, 1994) (Declaration Of Samuel Milham, Jr. On Offer Of Proof).....205a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, March 7, 1994) (Offer Of Proof By Plaintiffs Re: The Testimony Of Paula A. Lantsberger, M.D.) 219a

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The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et. al., et. ux., Plaintiffs, v. GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation, Defendants.	NO. 92-CS-0081-FVS PLAINTIFFS' LISTS OF CLAIMS, THEORIES OF LIABILITY, AND IDENTITY OF EXPERTS WHO WILL BE CALLED

EXHIBIT B
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS JOHN HOPKINS AND RUTH HOPKINS

I. PREAMBLE

Pursuant to order of the Court dated February 24, 1994, and filed on February 25, 1994, the Plaintiffs hereby list each claim against the Defendants, including all theories of liability or causation; and identifying each expert who will be called to testify concerning these claims and theories.

It should be noted that the Defendants have not challenged all of Plaintiffs' experts. Contrary to footnote 3 of the Court's order found on page 7, there are numerous other experts who have been identified by Plaintiffs, and will be called to testify, but who have not been challenged by the Defendants under Daubert v. Merrell Dow. At hearing on this matter, the Defendants identified three additional experts that they were challenging under the Daubert tests, Dr. Milham, and Mr. Estey and Breysee. Plaintiffs have supplemented the record with offers of proof as to these witnesses.

In addition, Plaintiffs will call other experts, which include all of the pulmonologists (who will testify as to the injuries caused to Plaintiffs by the unprotected exposure to chemicals provided by the Defendants), as well as "damage" experts who will testify to the care and treatment of Plaintiffs. These include all of the pulmonologists (who will testify as to the injuries caused to Plaintiffs by the unprotected exposure to chemicals provided by the Defendants), as well as "damage" experts who will testify to the care and treatment of Plaintiffs. These witnesses include Drs. Keppel, Ostrow, Corlett, Chapman, Colistro, Herdner, and Feldstein; and Greg Charboneau, Ed.D.; Deborah Lapoint, Bill Meehan, and Diane Nebel. None of these doctors or persons have been challenged by Defendants as being unqualified or their opinions challenged. No response is made here, nor have any proofs, concerning these individuals, been filed by Plaintiffs. It should be noted that these doctors and persons (with the exception of D. N. Lapoint) have been deposed and their opinions and matters upon which they will testify have been long known by the Defendants.

II. LIABILITY CLAIMS AGAINST DEFENDANT GENERAL ELECTRIC

Plaintiffs claim that General Electric (GE), as a general contractor for the clean-up of PCB contaminants at the Kaiser Aluminum Trentwood Plant in Spokane, Washington, breached a variety of duties owed to the Plaintiffs, (who are employees of QPI, a subcontractor of GE). These breaches of duties included:

(1) the negligent failure to provide a safe work place for the workers;

(2) the negligent failure to provide the workers with appropriate safety gear;

(3) the negligent failure to provide proper ventilation in the work area;

(4) the negligent failure to provide proper training to the workers;

(5) the negligent failure to warn the workers of the dangers of the chemicals being used;

(6) the negligent failure to provide competent management and supervisory personnel;

(7) the negligent performance of the cleanup;

(8) the negligent use of hazardous chemicals;

(9) the negligent failure to monitor and evaluate work site and worker toxicity;

(10) and otherwise failing to provide for the safety of the workers in this enclosed, below ground, work place;

(11) the negligent failure of the defendants to follow state and federal statutes and regulations applicable to the use of chemicals; and

(12) the negligent failure of the defendants to follow the suggested safety procedures as set forth in the MSDS's of each chemical used.

Additionally, the Plaintiffs contend that as a result of their unprotected exposure to these chemicals that they were injured. The nature of the injuries are, in general, brain injuries (also known as "toxic encephalopathy"), pulmonary injuries, and a variety of other ills that are known to occur with unprotected exposures to these particular chemicals.

Plaintiffs will prove liability through the following means: The testimony of Peter Breysee, Samuel Milham, William Morton, and Daniel Goldstein will discuss the effects of exposure to these chemicals. Plaintiffs will prove that the defendants violated numerous statues and regulations as set forth below. Plaintiffs will provide the defendants violated their own policies and procedures. The testimony of Breysee and Estey will disclose that the defendants violated health and safety standards. The testimony of Dale Haskins will concern violations of health and safety standards as well as the internal safety standards of GE. Plaintiffs will also show, through the Material Safety Data Sheets (MSDS) on each of these chemicals that failure to use these chemicals in a safe and appropriate way, produces injuries such as those suffered by the Plaintiffs.

The expert witnesses' testimony will be tied in with the testimony of the parties and lay witnesses who will report that the chemicals were not used in accordance with the safety provisions of those MSDS's, nor in accordance with the safety provisions of those MSDS's, nor in accordance with the safety standard as set forth by the applicable regulations or statues and as testified to by the experts.

Lastly, the testimony of the medical doctors and neuropsychologists will verify that the unprotected exposure to these chemicals has caused the Plaintiffs' injury.

III. THEORY OF LIABILITY AS AGAINST DEFENDANT KAISER ALUMINUM

Plaintiffs contend that the Defendant, Kaiser Aluminum (Kaiser), owed the same type of duties to the Plaintiffs as GE. Hence Kaiser's negligence springs from a violation of those duties. The same injuries are complained of against Kaiser.

IV. PROXIMATE CAUSE CLAIMS AGAINST DEFENDANTS

Plaintiffs' claim that Defendants' failures listed above, 1) caused detrimental changes in the Plaintiffs' physical,

mental and cognitive health;

2) caused aggravation of the Plaintiffs' pre-existing conditions;

3) the changes and aggravation have caused broad limitations in the Plaintiffs' abilities to function on a daily basis in all aspects of bodily functioning and daily existence;

4) the changes and aggravations have caused limitations or destroyed Plaintiffs; ability and capacities to function in daily activities and work.

Plaintiffs contend that all the Plaintiffs were injured by the Defendants failures listed above. The injuries vary in degree and nature for the various Plaintiffs.

Proximate cause should be very simple. The Plaintiffs were exposed to known toxic chemicals. As a result the Plaintiffs were poisoned. However, to link up the chain of proximate cause there are a variety of expert witnesses, who shall be testifying in their respective areas of expertise.

There was a degree of commonalty to the workers' exposure to the chemical. There were also pertinent differences between the exposures of the Plaintiffs. The Plaintiffs all had different degrees of pre-injury functioning and health, as well as individual susceptibility to the chemicals. On the basis of the foregoing there are some slight variations in the issues of causation for each Plaintiffs. There have been extensive depositions and offers of proof on the issue of causation for all the Plaintiffs. Those depositions and offers of proof are all incorporated by reference in this report to the Court.

There are potentially a variety of issues surrounding the claims of injury surrounding the broad issue of proximate cause. There are common issues on causation to all the Plaintiffs. The common issues provide an outline to the individual items for the individual Plaintiffs.

The common issues are addressed below.

1. The science of the chemicals involved is known.

a. The chemical make-up, weight, vapor pressure, By-products, break down products and metabolites of the chemicals involved are known.

b. The effects of these chemicals on the human

respiratory system, nervous system, gastrointestinal system, liver, heart, kidneys, and skin are known.

c. There has been extensive regulation by state and federal agencies as to the protection of workers based on the known science.

d. If the proper protection is not provided, the effect of these chemicals on humans is known.

2. When published materials of the Defendants are considered, there does not appear to be a dispute between the Plaintiffs and Defendants as to the general principles of causation.

3. What chemicals were present at the site are not disputed. Therefore, the physical events that occurred with unprotected exposure to the chemicals should not be disputed by the Defendants based upon the foregoing.

4. The predicate of liability is that the workers should have their respiratory system, nervous system, cardiovascular system, skin, gastrointestinal tract and other bodily organs protected from exposures to these chemicals. The duties owed by the Defendants should have been directed to protecting the worker from exposure.

a. The protection was either nonexistent or inadequate, so the plaintiffs were exposed to these chemicals.

b. The exposure to the chemicals varied as to the work performed and what chemicals the workers were working on at various times.

5. The exposure of the workers were repeated, acute exposures.

a. There were large amounts of the chemicals used in inadequately ventilated, below ground, confined areas.

b. Most of these chemicals are heavier than air.

c. Many of the chemicals were air borne therefore were breathable.

d. There was no adequate dermal protection, so the skin of the workers was directly exposed to the chemicals that they were working with.

6. The workers manifested symptoms that would be consistent with acute toxic poisoning by these chemicals at the time of exposure.

7. Although the Defendants did not provide medical monitoring for baseline data, the signs and symptoms of the workers were consistent with significant exposure to the chemicals present.

a. Based upon the amount of chemicals present, the known chemical properties of the chemicals and how the chemicals were being used, experts can express opinions as to the relative degree of exposure that the Plaintiffs had.

b. The signs and symptoms documented by the Health Department were what one would expect after a recent acute, repeated exposure to the chemicals that were present at the 1988 clean up.

c. The residual injuries the workers have are consistent with acute, repeated exposure of these chemicals.

8. In the real world a variety of professionals are involved in protecting the worker.

a. Toxicologists, occupational medicine physicians, neuropsychologists, and industrial hygienists are all involved routinely in protecting the workers.

b. Industrial hygienists, by the nature of their work, have scientific training, experience, education and background upon what the general effect will be of these chemicals on humans.

c. Neuropsychologists have knowledge, education, training and background on what effect these chemicals have on cognitive functioning, behavioral functioning and psychological functioning.

d. Medical doctors have familiarity with the effect of these chemicals on humans. Further, medical doctors in the regular courses of their practice consult and work with industrial hygienists and neuropsychologists as to the effect of these chemicals on workers.

9. There are general principles of proximate cause which apply to all of the workers.

a. The chemicals involved have known effects on the central and peripheral nervous system.

b. The effects on the central nervous system include cognitive abilities, intellectual abilities and aspects of

personality:

c. Depending upon the nature and degree of the exposure, route of exposure, and a person's individual propensities, the nervous system effects can include cognitive, intellectual, personality, peripheral damage, or any combination of the various aspects of the nervous system.

d. Any pre-existing limitations with intellectual, cognitive or personality function would be aggravated by exposure to these chemicals.

e. Persons with limitations of their intellectual, cognitive or personalities are more susceptible to a greater impact by exposure to these chemicals.

f. The level of scientific testing available does not always permit health care providers to distinguish whether an injury to the nervous system is damage to the central nervous system or to the peripheral nervous system. However, the functioning is still limited whether it be central or peripheral injury.

10. The respiratory system is sensitive to many of the chemicals used at the site.

a. Pre-existing history of lung problems or smoking predispose individuals to injuries.

b. Sudden onsets of Reactive Airways Disease Syndrome is consistent with toxic exposure to these chemicals.

c. The persistent cough and respiratory problem that the Plaintiffs have are consistent with injuries to their respiratory tracts from these chemicals.

d. With Reactive Airways Disease the workers become more sensitive to other chemicals, products, foods and irritants in the environment after their respiratory tract was injured by these chemicals.

The issue of proximate cause will be presented through the testimony of the workers, lay witnesses, 30(b)6 designees, expert witnesses, investigative and treating health care providers and other types of expert witnesses.

The published material of General Electric addresses succinctly the general premises of proximate cause. Plaintiffs have extensive evidence as to General Electric's own knowledge of

the dangers of these chemicals. Below are several sections of General Electric's material that, along with the 30(b)6 testimony, will prove there is no dispute as to the general principles of proximate cause with these chemicals.

General Electric knows that the chemicals used in the clean up would cause injury when used without adequate precautions and controls. In General Electric's book from the Department of Corporate Research and Development entitled Solvents and Safety, by J. Merlin Nielsen, it has been written:

> Many industrial processes and products require the use of solvents for controlled dispersion of materials, for . . . cleaning agents. Any such use involves potential hazards . . . to personnel. Safety with solvents requires that all the hazards involved in their particular used in a plant be recognized and provided for. When solvents are needed, they must be used with adequate precautions and control, with thorough training of workers, and with continual vigilance. Casual use of solvents without understanding and control is courting disaster.

General Electric knew that there should have been air quality monitoring and medical monitoring of the workers. In General Electric's Solvents and Safety the corporation states:

> When toxic substances are used or generated in the workplace, it is necessary to determine for these substances the air-borne levels at which workers are or can be exposed during the full working day. To make such an assessment, a survey of all the materials and their quantities used in the workplace must be made; and processing which occurs, including products and byproducts, must be identified. From this information, combined with a knowledge of the workplace of the engineering controls (for

example, general ventilation rates in the work area), of job assignments, processing conditions, etc. a rough approximation can be compared with safety and health requirements, but it is usually just a beginning of the information and measurements needed.

General Electric's own MSDS's and textbook Solvents and Safety addresses foundationally the issue of proximate cause.

In Solvent and Safety General Electric states:

> The normal human body is able to cope with a single exposure to a limited amount of toxic material, but when the amount imposed on the body's defenses exceeds certain levels, the body cannot handle the problem and injury results. This threshold level for injury can differ for each toxic substance and for each individual. It also can vary for a given individual at different times depending on his metabolic situation. Illness and disease (past or current), fatigue and stress, nutritional status, the prior or simultaneous presence of other toxic substances, etc., can call affect the detoxifying mechanisms of the body. Sex and genetic factors can influence the body's ability to resist damage from certain toxic materials.
>
> The assault on the body's defenses by a toxic material may result from a single, relatively massive confrontation (acute toxicity) or from repeated or continuous contract with lower, apparently tolerable levels for a long period of time (chronic toxicity). (Emphasis added).

These admissions and others not set forth herein, should be sufficient in and of themselves to submit these issues to the trier

of fact.

V. EXPERTS WHO WILL BE CALLED TO TESTIFY REGARDING EACH CLAIM OR THEORY.

In addition to the named experts below, the Plaintiffs will rely upon the breach of various governmental administrative regulations and statutory enactments. These violations will be proven through the testimony of the Plaintiffs, Defendants' employees, answers to interrogatories, and other discovery, and deposition testimony. The regulations and statutes include:

R.C.W. 49.17.060; WAC 296-155-040(2); 29 U.S.C. 651(b); WAC 296-62-05143; WAC 296-62-05403(1),(4); 29 CFR 1910.1200(c), (e), (g), (g) 8, (h), (h)1.2; WAC 296-62-5409, 29 CFR 1910.1000 (Table Z-1.2) and its subparts; WAC 296-62-07515 (Table 1.2); WAC 296-62-7501 and its subparts; WAC 296-24-020; 296-24-073; 296-62-07005; 296-62-07107; 296-62-07109; 296-62-14501; 296-62-14503; 296-62-14505; 296-62-14507; 296-62-14517; 296-62-14529; and 296-62-11005. Rather than repeat the meaning of each of these subsections, the Court, should it so desire should review Plaintiffs' proposed instructions on these issues. As the Court is well aware, the violation of a regulation in Washington carries the same effect of negligence as any other proofs of negligence made at trial.

There are multiple Plaintiffs. The liability and proximate cause issues are vast. Below is a simple graph dividing out the various areas of testimony from experts:

NAME	STANDARDS	BREACH	GENERAL PROXIMATE CAUSE	SPECIFIC PROXIMATE CAUSE
BREYSSE	X	X		
ESTEY	X	X		
MORTON		X	X	X
GOLDSTEIN	X	X	X	X
MILHAM	X	X	X	
CRIPE			X	X
WEINS			X	X
CORLETT			X	
CHAPMAN			X	X
LANTSBERGER		X	X	X
CHARBONEAU				X
COLISTRO			X	X
HERDNER				X
KEPPEL			X	X
FELDSTEIN			X	X
BEATY			X	X
OSTROW			X	X
BYRD				X
HASKIN	X	X		
MEEHAN				X
LAPOINT				X
30(b)6	X	X	X	

EXHIBIT B
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS JOHN HOPKINS AND RUTH HOPKINS

Plaintiffs' challenged expert witnesses are:

A. **Peter A. Breysse**:

Mr. Breysse will testify in accordance with his offer of proof previously filed herein, the deposition exhibits and testimony, the records and reports of this expert previously forwarded to the defendants, and the answers to the interrogatories;

B. **Dr. Samuel Milham**:

Dr. Milham will testify in accordance with his offer of proof previously filed herein, the deposition exhibits and testimony, the records and reports of this expert previously forwarded to the defendants, and the answers to the interrogatories;

C. **Dr. William E. Morton**:

Dr. Morton will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records and reports previously provided to the defendant, and the answers to the interrogatories;

D. **Dr. Lloyd Cripe**:

Dr. Cripe will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records and reports previously provided to defendants and interrogatory answers;

E. **Dr. Robert Stanulis**:

Dr. Stanulis will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records and reports and interrogatory answer;

F. **Dr. Arthur Weins**:

Dr. Weins will testify in accordance with his offer of proof previously filed herein, his deposition testimony and exhibits, his records and reports previously provided to the defendants and the interrogatory answer;

G. **Dr. Robert Corlett**:

Dr. Corlett will testify as to the care and on-going treatment of Deborah Guaragna Williams, his deposition testimony, his records and reports (previously forwarded and obtained by the defendants, and the answers to interrogatories); (it

should be noted that Dr. Corlett was not challenged on Daubert;

H. Dr. Jean Chapman:

Dr. Chapman will testify as to the care and on-going treatment of Deborah Guaragna Williams, her deposition exhibits and testimony, her general understanding of the effect of these chemicals on the brain, respiratory system and other portions of the body, the records of this expert previously forwarded and obtained by the defendants, and the answers to interrogatories; Dr. Chapman was not challenged on Daubert issues;

I. Dr. Paula Lantsberger:

Dr. Lantsberger will testify in accordance with her offer of proof previously filed herein, her depositions exhibits and testimony, the records of this expert previously obtained and provided to the defendants and the answers to interrogatories.

J. Greg Charboneau, Ed.D.:

Mr. Charboneau will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records previously obtained and provided to the defendants, and the answers to interrogatories. Mr. Charboneau was not challenged on Daubert issues;

K. Dr. Colistro:

Dr. Colistro will testify in accordance with his deposition testimony, and the answers to interrogatories;

L. Dr. Herdner:

Dr. Herdner will testify in accordance with his report previously provided to the defendants as part of his role as an independent medical examiner for the Department of Labor and Industries. Dr. Herdner was not challenged on Daubert issues;

M. Dr. Keppel:

Dr. Keppel is the pulmonologist who will testify that the chemicals used have caused permanent injuries to Deborah Guaragna Williams and Ruth and John Hopkins. He will further testify to the degree of such disability, the mechanics, and the treatment for, said injuries, and in accordance with his deposition testimony, his records previously provided to the defendants and the answers to interrogatories. Dr. Keppel has not been challenged by defendants. His deposition has been taken on two occasions.

N. Dr. Feldstein:

Dr. Feldstein is the head of occupational medicine at Kaiser Permanente in Portland, Oregon. Dr. Feldstein will testify as to the treatment of Deborah Guaragna Williams, John Hopkins, and Ruth Hopkins and her opinion that the injuries they suffered to their memories, and pulmonary system are compatible with an exposure to industrial solvents, in accordance with deposition exhibits and testimony, the records of this expert previously provided to the defendants, and the answers to interrogatories. Dr. Feldstein has not been challenged on Daubert issues.

O. Dr. Beaty:

Dr. Beaty will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, the records of this expert previously obtained and provided to the defendants, and the answers to interrogatories.

P. Dr. Goldstein:

Dr. Goldstein will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records previously provided to the defendants, and the answers to interrogatories.

Q. L. Joseph Estey:

Mr. Estey will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, the records of this expert, and the answers to interrogatories.

R. Dr. Ostrow:

Dr. Ostrow is the pulmonologist who will testify that the chemicals used have caused permanent injuries to Deborah Guaragna Williams and Ruth and John Hopkins. He will further testify to the degree of such disability, the mechanics, and the treatment for, said injuries. Dr. Ostrow has not been challenged by the defendants. His deposition testimony has been scheduled, but not taken. His records and reports have been provided to the defendants.

S. Dr. Byrd:

Dr. Byrd is a pulmonologist who will testify regarding Ruth Hopkins' hospitalization for 3-4 days in December, 1988, following her exposure at the Kaiser Trentwood plant. Dr. Byrd has been deposed and his records provided to the defendants and the substance of his knowledge and testimony regarding his dealings with Ruth Hopkins are known to the defendants. Dr. Byrd has not been challenged by the defendants.

T. Bill Meehan:

Mr. Meehan is an educator. He will testify as to school testing and Indian cultural aspects of grades and testimony.

In addition to the above, Plaintiffs will call Diane Nebel, Dale Haskins, Deborah Lapoint and Bill Meehan. There is an offer of proof on file for Ms. Lapoint. These persons qualify as experts although they are not medical doctors and have not been challenged by the Defendants pursuant to Daubert.

VI. SUPPLEMENTS TO OFFERS OF PROOF

Plaintiffs have supplemented the offers of proof for each of the persons claimed by Defendants to not meet the Daubert test.

DATED this 7th day of March, 1994.

DAWSON & MEADE

s/_____
Edward A. Dawson, WSBA 02991
Attorney for Plaintiff Carlson and for all Plaintiffs and Messrs. Schauermann and Phelan

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March 1994, true copies of an:

Plaintiffs' Lists Of Claims, Theories of Liability, and Identity of Experts Who Will Be Called,
was served on:

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EASTERN DISTRICT OF WASHINGTON
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JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
	)	PLAINTIFFS' MEMORANDUM ON POTENTIAL INSTRUCTIONAL ERROR BY ATTEMPTING TO DEFINE AREA OF INJURY

EXHIBIT C
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS
WILLIAMS, FROESE, GLASS, SCHUDEL(S),
THOMPSON, AND SANDY SCHUDEL 1

Plaintiffs.	)
v.	)
	)
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation.	)
Defendants.	)

PLAINTIFFS' POSITION

It is Plaintiffs' position it would be error to instruct on the individual injury contentions of the Plaintiffs. Further, it is Plaintiffs position it would be error to require specific findings of fact on the area of individual injury for individual Plaintiffs.

LAW

Throughout this litigation the Defendants have attempted to blur the law as it relates to admissibility of evidence and the burden of proof. It is anticipated the Defendants will likewise attempt to blur the distinction between admissibility of evidence with the establishment of a prima facie case sufficient to support an instruction as to the elements of damage.

The basic issue is whether Plaintiffs have prima facie evidence of injury to the body/mind of each Plaintiff. Plaintiffs have introduced evidence of such injury. (See appendix A to this memorandum.) Defendants' usual response is to say the evidence is insufficient to let the issue go to the jury. Plaintiffs have previously addressed to the Court that challenges to such evidence goes to weight and not admissibility.

For example, a jury can weigh the credentials of Dr. Lantsberger against those of Dr. Bruya as to pulmonary injuries. Plaintiffs are entitled to have the individual place whatever weight he or she chooses on the education, knowledge, experience and

skill of these witnesses. An individual juror may choose to place all the weight on the credentials of a witness; while another juror may choose to place equal weight on credentials and sources of information considered. Under the law, either method of weighing the evidence is acceptable. All the law requires the jurors to do is to discuss and consider all evidence before reaching a decision. See Court's Proposed Instruction nos. 35 and 33.

Under Court's Instruction nos. 33 and 35 one juror may individually determine one Plaintiff has emotional suffering from exclusively a psychological stand point. Another juror may individually determine the same Plaintiff has emotional suffering due to a psychological reaction to a physical problem. After discussion and consideration, all the law requires the jury to do is to agree on whether that Plaintiff was injured by the exposure to toxic chemicals at the 1988 PCB cleanup. A jury is not required to agree that the injury occurred in a certain manner or that the injury was all psychological or a combination of psychological/physical factors.

A similar analysis could be performed on the question of memory loss. Some of the jurors may believe a Plaintiff's memory loss is due to a brain injury. Other jurors may believe the memory loss is due to depression over being physically limited by pain and respiratory problems. All the jurors have to agree on is that the Plaintiff was injured. The jurors are not required to agree as to the injury being solely psychological, physical or both.

Individual injury contentions should not be listed in the instructions or in the special verdict form. A listing of the health contentions would mislead the jury as to its function and responsibilities under the law. cf State v. Hayes, 73 Wn.2d 568, 572, 439 P.2d 978 (1968). The jury's responsibility is to find duty, breach and damages. "The test in this situation is not a matter of semantics, but whether the jury was mislead as to its function and responsibilities under the law." Id., 572. Plaintiffs' Proposed instructions nos. 49, 50, 51 are correct statements of the law.[1] Under the law, it is the jury's responsibility to determine

---

[1] Plaintiffs understand that these instructions need to be modified to reflect, which Plaintiffs are recoving for which elements of damages. For example

whether Plaintiffs have proven that each individual Plaintiff was injured. It is not the jury's responsibility to make a factual finding as to whether the injuries were psychological or physiological. Likewise it is not the jury's responsibility to determine whether a memory loss is from brain injury or depression. It is the jury's responsibility to determine whether a Plaintiff's memory loss, pulmonary complaints, depression, etc., was probably caused by the negligent exposure to chemicals in 1988 during the PCB clean-up.

Respectfully submitted this 26th day of June, 1994.

DAWSON & MEADE

s/_____
Marcia M. Meade, WSBA #11122
Attorney for Plaintiff Carlson

SCHAUERMANN & THAYER

s/_____
Craig F. Schauermann, WSBA #7396
Attorney for Plaintiffs Schudel, Glass, Howell, Thompson and Guaragna

THOMAS C. PHELAN

s/_____
Thomas C. Phelan, WSBA #11373
Attorney for Plaintiffs Hopkins

Craig Thompson does not have a claim for earning capacity loss.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 1994, true copies of:

Plaintiffs' Memorandum on Potential Instructional Error by Attempting to Define Area of Injury

was served on the following:

James B. King — **HAND DELIVERED**
Keefe, King & Bowman
1102 Washington Mutual Building
W. 601 Riverside
Spokane, WA 99201
Attorney for Defendants General Electric and Kaiser Aluminum

Joe G. Hollingsworth & — **HAND DELIVERED**
Katharine R. Latimer
Spriggs & Hollingsworth
1350 "I" St., N.W., 9th Floor
Washington D.C. 20005
Attorneys for Defendants General Electric and Kaiser Aluminum

s/Marcia M. Meade

INSTRUCTION NO. 28

It is a duty of the Court to instruct you as to the measure of damages in regard to the following plaintiffs:

Timothy Schudel, and
Sandra Schudel, husband and wife,
John Hopkins, and
Ruth Hopkins, husband and wife.

By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for a particular plaintiff, then you must determine the amount of money which will reasonably and fairly compensate that plaintiff for such damages as you find were proximately caused by the fault of defendants.

As to the plaintiffs, Timothy Schudel, John Hopkins, and Ruth Hopkins, you should consider all of the following past economic damages elements:

1. The reasonable value of necessary medical care, treatment and services received to the present time;
2. The reasonable value of earnings, salaries and earning opportunities lost to the present time; and
3. The reasonable value of necessary household services, other than medical, required to the present time.

In addition, you should consider the following future economic damages elements:

1. The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;
2. The reasonable value of earning capacity and employment opportunities which with reasonable probability will be lost in the future; and
3. The reasonable value of necessary household services and expenses which with reasonable probability will be required in the future.

In addition, you should consider the following non-economic damages elements for Tim Schudel, John Hopkins, and Ruth Hopkins.

EXHIBIT C
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS
WILLIAMS, FROESE, GLASS, SCHUDEL(S),
THOMPSON, AND SANDY SCHUDEL 1

1. The nature and extent of the injuries;
2. The disability and loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future; and
3. The mental, physical, and emotional pain and suffering experienced, and which with reasonable probability, will be experienced in the future.

If you find for the plaintiff, Timothy Schudel, you should also consider the following elements of damage to his wife, Sandra Schudel. In the law, these elements of damage are called loss of consortium.

1. The reasonable value of the loss of the spouse's love, companionship, comfort, affection, society, solace or moral support lost or with reasonable probability to be lost in the future;
2. The reasonable value of loss of physical assistance in the operation and maintenance of the home lost or with reasonable probability to be lost in the future;
3. The reasonable value of loss of enjoyment of sexual relations suffered both in the past and with reasonable probability to be suffered in the future.

Similarly as to the plaintiffs John Hopkins and Ruth Hopkins, if you find for either or both of them, you should consider the same elements of loss of consortium.

The burden of proving damages rests with the party claiming them, and it is for you to determine whether any particular element has been
proved by a preponderance of the evidence.

The law has not furnished us with any fixed standards by which to measure pain, suffering, loss of enjoyment of life, or disability. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 29

It is a duty of the Court to instruct you as to the measure of damages in regard to the following plaintiffs:

Merlin Carlson,
Daniel Glass,
Deborah Guaragna Williams
Kathrene Froese, and
David Schudel.

By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for a particular plaintiff, then you must determine the amount of money which will reasonably and fairly compensate that plaintiff for such damages as you find were proximately caused by the fault of defendants.

As to the plaintiffs Merlin Carlson, Daniel Glass, Deborah Guaragna Williams, Kathrene Froese, and David Schudel, you should consider all of the following past economic damages elements:

1. The reasonable value of necessary medical care, treatment and services received to the present time;

2. The reasonable value of earnings, salaries and earning opportunities lost to the present time; and

3. The reasonable value of necessary household services, other than medical, required to the present time.

In addition, you should consider the following future economic damages elements:

1. The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;

2. The reasonable value of earning capacity and employment opportunities which with reasonable probability will be lost in the future; and

3. The reasonable value of necessary household services and expenses which with reasonable probability will be required in the future.

In addition, you should consider the following

non-economic damages elements:

1. The nature and extent of the injuries;

2. The disability and loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future; and

3. The mental, physical, and emotional pain and suffering experienced, and which with reasonable probability, will be experienced in the future.

The burden of proving damages rests with the party claiming them, and it is for you to determine whether any particular element has been proved by a preponderance of the evidence.

The law has not furnished us with any fixed standards by which to measure pain, suffering, loss of enjoyment of life, or disability. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 31

You are instructed that lost earnings are different from a loss of future capacity to earn.

Impairment to the plaintiff's future earning capacity is established when a plaintiff proves that one or both of the defendants caused an injury which lessens or reduces his or her future money- making faculties or income potential.

In determining any future impairment to the Plaintiff's earning capacity, you should consider age; the nature of the injuries, plaintiff's work capabilities in the future compared to his or her capability before the occurrence. If the plaintiff proves that one or both of the defendants caused his or her injury, and the plaintiff proves that he or she is unable to work as well as that plaintiff could before the injury, that plaintiff is entitled to compensation for impairment of his or her earning capacity.

INSTRUCTION NO. 32

According to the mortality tables, the average expectancy of life of each of the Plaintiffs is as follows:

NAME	DATE OF BIRTH	LIFE EXPECTANCY
Merlin Carlson	09/04/65	45 years
Daniel Glass	12/09/60	40 years
Kathrene Howell Froese	03/08/56	40 years
Deborah Guaragna-Williams	08/23/61	46 years
Ruth Hopkins	05/24/45	32 years
John Hopkins	11/19/46	28 years
Craig Thompson	10/02/62	42 years
David Schudel	05/19/62	42 years
Timothy Schudel	03/15/60	40 years

This one factor is not controlling, but is to be considered in connection with all of the other evidence bearing on the same question, such as that pertaining to the health, habits, and activities of the person whose life expectancy is in question.

INSTRUCTION NO. 33

If you find that before this occurrence a plaintiff had a pre-existing bodily condition which made the plaintiff more subject to injury than a person in normal health, then you should consider all injuries and damages which were proximately caused by the occurrence, even though those injuries, due to that condition, may have been greater than those which would have been suffered by normal person under the same circumstances. There may be no recovery, however, for any results which would have normally followed from the pre-existing conditions had there been no occurrence.

INSTRUCTION NO. 34

If you find for more than one plaintiff, you should assess the damages of each separately.

James B. King
Keefe, King & Bowman, P.S.
Attorneys at Law
W. 601 Main Avenue, #1102
Spokane, WA 99201
509/624-8988

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF
WASHINGTON
JUL 27 1994
JAMES R. LARSEN,
CLERK _____DEPUTY

Joe G. Hollingsworth
Spriggs & Hollingsworth
1350 I Street, NW, Ninth Flr.
Washington, DC 20005
202/898-5842
Attorneys for Defendant General Electric Co.
and Kaiser Aluminum and Chemical Corp.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
Plaintiffs,	)	DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW
v.	)	(FED.R.CIV.P. 50 (B))
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign	)	

EXHIBIT C
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS
WILLIAMS, FROESE, GLASS, SCHUDEL(S),
THOMPSON, AND SANDY SCHUDEL 1

corporation,)
)
Defendants.)

Pursuant to Fed. R. Civ. P. 50(b), defendants the General Electric Company ("General Electric") and Kaiser Aluminum Corporation ("Kaiser") renew their motion for judgment as a matter of law against each plaintiff.

In support of this Motion, Defendants refer the Court to the accompanying Memorandum In Support of Renewed Motion for Judgment as a Matter of Law (Fed. R. Civ. P. 50(b)).

DATED this 27th day of July, 1994.

KEEFE, KING & BOWMAN, P.S.

By s/_____
JAMES B. KING
WSBA No. 8723

SPRIGGS & HOLLINGSWORTH

By s/_____
JOE G. HOLLINGSWORTH

Attorneys for Defendants
General Electric Company and
Kaiser Aluminum and Chemical Corp.

JAMES B. KING
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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF
WASHINGTON
JUL 27 1994
_____DEPUTY

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Attorneys for Defendant General Electric Co.
and Kaiser Aluminum and Chemical Corp.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof.	)	NO. CS-92-0081-FVS
Plaintiffs,	)	DEFENDANTS' MOTION FOR NEW TRIAL OR ALTERNATIVE RELIEF (FED.R.CIV.P. 59)
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation;	)	

EXHIBIT C
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS
WILLIAMS, FROESE, GLASS, SCHUDEL(S),
THOMPSON, AND SANDY SCHUDEL 1

and KAISER ALUMINUM)
CORPORATION, a foreign)
corporation,)
)
Defendants.)

Pursuant to Fed. R. Civ. P. 59, and as an alternative to judgement as a matter of law under Fed. R. Civ. P. 50(b), defendants the General Electric Company and Kaiser Aluminum Corporation move for a new trial or alternative relief.

In support of this Motion, Defendants refer the Court to the accompanying Memorandum In Support of Motion for New Trial or Alternative Relief (Fed. R. Civ. P. 59).

DATED this 27 day of July, 1994.

KEEFE, KING & BOWMAN, P.S.

By s/_____
JAMES B. KING
WSBA No. 8723

SPRIGGS & HOLLINGSWORTH

By s/_____
JOE G. HOLLINGSWORTH

Attorneys for Defendants
General Electric Company and
Kaiser Aluminum and Chemical Corp.

Marcia M. Meade
Edward A. Dawson
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Craig F. Schauermann
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Thomas C. Phelan
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Vancouver, WA 98661
(206) 750-8750

Attorneys for Plaintiffs

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
DEC 09 1994
JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
	)	
	)	
	)	MOTION THAT THE ORDER OF NOVEMBER 25, 1994, IS A FINAL DECISION AND THERE IS NO JUST REASON FOR DELAY
	)	
	)	
	)	
Plaintiffs,	)	

v.)
)
GENERAL ELECTRIC)
COMPANY, a foreign corporation;)
and KAISER ALUMINUM)
CORPORATION, a foreign)
corporation.)
Defendants.)

COMES NOW the Plaintiffs and move the Court for a finding pursuant FRCP 54 that the order of November 25, 1994 is a final decision and there is no just reason for delay. This motion is based upon the files and records herein and the attached Affidavit.

DATED this 9th day of December, 1994.

DAWSON & MEADE

S/_____
Edward A. Dawson,
Attorney for Plaintiff Carlson

SCHAUERMANN & THAYER

S/_____
Signed with authority for:
Craig F. Schauermann, WSBA #7396
Attorney for Plaintiffs Schudel,
Glass, Howell, Thompson &
Guaragna

S/_____
Signed with authority for:
Thomas C. Phelan, 11373
Attorney for Plaintiffs Hopkins

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 1994, true copies of the:

. Motion That The Order Of November 25, 1994, Is A Final Decision And There Is No Just Reason For Delay;

. Affidavit of Edward A. Dawson; and

. Plaintiff Notice of Hearing,

was served on the following:

James B. King — **HAND DELIVERED**
Keefe, King & Bowman
1102 Washington Mutual Building
W. 601 Riverside
Spokane, WA 99201
Attorney for Defendants General Electric and Kaiser Aluminum

Joe G. Hollingsworth & — **U.S. MAIL**
Katharine R. Latimer
Spriggs & Hollingsworth
1350 "I" St., N.W., 9th Floor
Washington D.C. 20005
Attorneys for Defendants General Electric and Kaiser Aluminum

S/_____
Tonya Wylie

Marcia M. Meade
Edward A. Dawson
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Thomas C. Phelan
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806 Officers Row
Vancouver, WA 98661
(206) 750-8750
Attorneys for Plaintiffs

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
DEC 29 1994
JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, DANIEL GLASS, MERLIN E. CARLSON, TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof, KATHRENE RAE HOWELL, CRAIG A. THOMPSON, DEBORAH GUARAGNA, and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
	)	PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO FRCP 54(b) LANGUAGE
Plaintiffs.	)	

v.	)
	)
GENERAL ELECTRIC	)
COMPANY, a foreign corporation;	)
and KAISER ALUMINUM	)
CORPORATION, a foreign	)
corporation,	)
Defendants.	)

PERTINENT FACTS TO FRCP 54(B)

When this action was filed, it was filed as a negligence claim for all of the Plaintiff-Workers. On February 28, 1994 the Court ordered the Plaintiffs to:

. . . (a) list each claim against the Defendants, including all theories of liability, or causation . . .[2] In complying with the Court's Order, the Plaintiffs did on March 7, 1994[3], file with the Court a listing that all Plaintiffs were making a claim for negligence. Thereafter, the Plaintiffs listed approximately 12 theories of liability for negligence. In that pleading, the Plaintiffs listed over 10 pages their theories of causation as to the Plaintiffs' injuries arising out of negligence.[4]

At the time of instructing the jury, the Court asked that the Plaintiffs provide a list of the damages contended by the Plaintiffs. The Plaintiffs provided the Court with lists for each Plaintiff.[5] The Plaintiffs also filed with the Court a Memorandum addressing their exceptions to the placing of factual contentions rather than the legal damage elements in the jury's instructions.[6]

Neither General Electric nor Kaiser Aluminum ever presented the Court with a request for a special verdict form as to the individual damages for each Plaintiff. Nor did Defendants, under FRCP 49(a), request special interrogatories as to factual

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[2]See the Court Order of February 28, 1994, p. 7 16-17.

[3]See Plaintiffs' Lists of Claims, Theories of Liability, and Identity of Experts Who Will Be Called, said pleading also contained causation theories.

[4]See footnote 2 supra at p. 4 through 10.

[5]See the Affidavit of Marcia M. Meade on Responding to Opposition to FRCP 54(b) Findings.

[6]See Plaintiffs' Memorandum on Potential Instructional Error by Attempting to Define Area of Injury.

contentions. Plaintiffs understood under FRCP 49(a) it was General Electric's or Kaiser Aluminum's burden to request such a special interrogatory.

More than four months after the judgment on the verdict, the District Court has granted a new trial sua sponte because of an alleged instructional errors.

Plaintiffs have contended the District Court did not have jurisdiction to decide post-trial motions, because the motions were not timely served.

SHORT ANSWER

There are five basis for finding that the Order for a New Trial are final. The basis are:

1. There is a challenge as to the trial court's jurisdiction to hear post-trial motions;

2. Four months after the entry of the judgment on the verdict, the trial court sua sponte granted a new trial because of alleged errors in instructions to the jury;

3. The Defendants have waived any right to challenge the general verdict for failure to request special interrogatories under FRCP 49(a);

4. There is but one claim by the Plaintiffs that is negligence; and

5. By looking at the substantial effect of the new trial in light of the other rulings which are appealable as a matter of right, it should be found that the New Trial Order is final under the auspices of FRCP 54(b).

Should the Plaintiffs prevail on any one of the matters above, a question of a new trial will be moot. For the original verdict will be reinstated as to all of these Plaintiffs, thereby making a second trial unnecessary.

LAW

Plaintiffs' "Complaint" and position throughout the pendency of this litigation has been that there has been a negligence claim for each Plaintiff-Worker. Under Washington law the essential elements of an actionable claim for negligence are: "(1) the existence of a duty owed to the complaining party; (2)

a breach thereof; (3) a resulting injury; and (4) a proximate cause between the claimed breach and the resulting injury." Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Throughout this litigation Defendants have persisted in denominating an element of a negligence claim as a separate claim. Yet, under Washington law an injury standing alone is merely an element of a claim of negligence. Each injury to a part of a body is not a separate claim, but rather a factual basis of one element of negligence.

In attempting to support their position that the order for a new trial is not final, Defendants cite Eaton v. National Steel Products, 624 F.2d 863 (1980). Eaton noted that an order for a new trial is considered final, when at 864:

> Though an exception to this rule has been recognized when the District Court grants a new trial when it has no jurisdiction to do so. . .

Plaintiffs have contended the trial court did not and does not have jurisdiction to hear FRCP 50(b) and 59 motions. As early as 1886, the United States Supreme Court has recognized that when an order granting a new trial, which normally would be interlocutory, is treated as an appealable final order, when there is a challenge to jurisdiction. See Phillips v. Negley, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013 (1886). Also see Stradley v. Cortez, 518 F.2d 488, 491 (1975).

At trial neither General Electric nor Kaiser Aluminum objected to the Verdict Form and interrogatories as finally propounded to the jury. Neither General Electric nor Kaiser Aluminum proposed special interrogatories under FRCP 49(a). The failure to request a special verdict form as to each factual theory in a case results in a failure to present appropriate records for review for challenge of sufficiency of evidence to support the Plaintiffs' claim as to damage. McCord v. McGuire, 873 F.2d 1271, 1274 (9th Cir. 1989). Under FRCP 49(a) it was Defendants' burden to propose special interrogatories on damages.

In post-trial rulings the trial court sua sponte proposed that special interrogatories identifying the bodily damages individually. These sua sponte rulings on alleged instructional errors occurred more than four months after the judgment on the

verdict. In a similar situation, Peterman v. Chicago, Rock Island and Pacific Railroad Co., 493 F.2d 88 (8th Cir. 1974), the District Court considered whether the jury had been adequately instructed on the proximate cause of injuries. The Peterman Court held that the District Court lacked any power to sua sponte grant a new trial because of any alleged error in the instructions to the jury. Peterman at 91.

Many of the authorities cited by the Defendants are situations in which there have been summary judgment proceedings dismissing portions of the party's claims. The present case occurred after a trial. In those circumstances where the court has held that the granting of a new trial is not an appealable order, there are other circumstances that are considered at those times. Those circumstances consider whether there has been a motion for a remittitur. In the present case there was no motion for a remittitur. There are case where the court has found the damages awarded to the Plaintiff are inadequate. Here, the Defendants have suggested that there be no damages at all. Neither Defendants or Plaintiffs have placed the present jury verdicts at issue. Should the Plaintiffs prevail on appeal, there will be no need for a further trial.

In Tagupa v. East-West Center, Inc., 642 F.2d 1127 (9th Cir. 1980), the question of appealability of interlocutory orders was considered. There the Court advised "we look to the substantial effect rather than its terminology." Id. at 1129. The substantial effect of what the Court has ordered, if it is not treated as a final order, could result in three more trials, rather than at most two more trials. If this is found to be a final order for purposes of appealability, then the most that would occur would be two more trials. There is a high likelihood, given the jurisdictional issues on service of the post-trial motions, and the sua sponte rulings, that this matter will be disposed of with the original trial.

CONCLUSION

In the interest of judicial economy and in the interest of the practical economics of all the parties involved, this should be treated as a final order.

Respectfully submitted this 28th day of December, 1994.

DAWSON & MEADE

s/_____
Marcia M. Meade, WSBA #11122
Attorney for Plaintiff Carlson
and on behalf of Craig F.
Schauermann and Thomas Phelan
for their respective clients

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 1994, true copies of:

Plaintiffs' Reply to Defendants' Opposition to FRCP 54(b) Language

was served on the following:

James B. King — **U.S. MAIL**
Keefe, King & Bowman
1102 Washington Mutual Building
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Attorneys for Defendants General Electric and Kaiser Aluminum

s/Marcia M. Meade

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Attorneys for Plaintiffs

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
DEC 28 1994
JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
Plaintiffs,	)	AFFIDAVIT OF MARCIA M. MEADE IN RESPONSE TO DEFENDANTS' OPPOSITION TO THE FRCP 54(b) LANGUAGE

v.)
)
GENERAL ELECTRIC)
COMPANY, a foreign corporation;)
and KAISER ALUMINUM)
CORPORATION, a foreign)
corporation,)
Defendants.)

STATE OF WASHINGTON)
):ss
County of Spokane)

Marcia M. Meade, being first duly sworn on oath, deposes and says:

1. I am counsel of record. The following documents are pertinent to Defendants' opposition to the Court finding this to be a final decision as to all of the Plaintiffs under FRCP 54(b).

2. On February 28, 1994, the Court ordered Plaintiffs "it is hereby ordered: 1. By March 7, 1994, the Plaintiffs shall do the following: (a) list each claim against the Defendants, including all theories of liability or causation.. .(emphasis added).

3. In complying with that Order, the Plaintiffs filed with the Court a 19 page pleading entitled "Plaintiffs' List of Claims, Theories of Liability, and Identity of Experts Who Will Be Called" on March 7, 1994. This pleading also listed Plaintiffs' theories of causation.

4. The above document listed that the Plaintiffs were making a claim as to negligence. There were approximately 12 different theories of the claim of negligence. Thereafter, for ten pages the Plaintiffs identified their theories of proximate cause.

5. The Plaintiffs also identified that they filed extensive offers of proof as to the witnesses, who would be testifying on the issues of causation as it related to the Plaintiff-Workers.

6. At the time of jury instructions, the Court asked the Plaintiffs to provide it with a list of what each Plaintiff was contending their damages to be.

7. The Plaintiffs did provide to the Court responses to each. See attached Exhibits A, B, and C. Plaintiffs counsel also identified in memorandum their exception and authorities as to it

being error to instruct on individual factual components of damages.

8. At all times Plaintiffs have identified their negligence claim as they understood Washington's CR 8(a) and FRCP 8(a) have denominated a claim to be.

9. Affiant has always understood the law to be that damages are an element of a claim. Further that a damage element, alone, does not constitute a claim.

s/_____
Marcia M. Meade

SUBSCRIBED AND SWORN to before me this 28 day of December, 1994.

s/ Lisa Keller
NOTARY PUBLIC in and for the State of Washington residing in Spokane.
Commission Expires: 6/28/98.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 1994, true copies of:

Affidavit of Marcia M. Meade in Response to Defendants' Opposition To The FRCP 54(b) Language

was served on the following:

James B. King — **U.S. MAIL**
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Attorney for Defendants General Electric and Kaiser Aluminum

Joe G. Hollingsworth & — **U.S. MAIL**
Katharine R. Latimer
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s/ Marcia M. Meade

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Craig F. Schauermann
SCHAUERMANN & THAYER
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et al., et ux.,	)	
Plaintiffs,	)	NO. 92-CS-0081-FVS
v.	)	
	)	PLAINTIFFS'
GENERAL ELECTRIC COMPANY, et al.	)	CONTENTIONS ON MERLIN CARLSON
Defendants.	)	

COMES NOW the Plaintiffs and identify for the Court the contentions as to Merlin Carlson. It is contended that Merlin Carlson had an injury to his mind and his body at the time of the exposure. Including the present experience of alternations in consciousness, rash, breathing difficulties, coughing, headaches, nausea, vomiting. The injury to his mind and body include the development of solvent syndrome, toxic encephalopathy, memory

loss, concentration difficulties, irritability, mood swings, depression, injury to his lungs, injury to his personality and injuries to all of his organ systems which manifested as solvent syndrome, aggravation of his existent level of cognitive functioning, aggravation of his lung function, permanent respiratory problems, loss of his ability to live independently, loss of his ability to become medicine man, loss of his ability and capacity to enjoy life, loss of his ability and capacity to work, mental and physical pain and suffering.

DATED this 24 day of June, 1994.

DAWSON & MEADE

s/_____
Marcia M. Meade, WSBA #11122
Attorney for Plaintiff Carlson

Thomas C. Phelan
Attorneys at Law
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(206) 750-8750
Attorneys for Plaintiffs Hopkins

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et al., et ux.,	)	
	)	
Plaintiffs,	)	No. 92-CS-0081-VS
	)	
vs.	)	
	)	
GENERAL ELECTRIC COMPANY, a	)	SUMMARY OF
foreign corporation, and KAISER	)	CLAIMS OF
ALUMINUM CORPORATION,	)	INJURIES FOR
a foreign corporation,	)	PLAINTIFFS
JOHN	)	HOPKINS AND
Defendants.	)	RUTH HOPKINS

JOHN HOPKINS and RUTH HOPKINS, by and through their attorney of record, Thomas C. Phelan, hereby sets forth their summary of claims of damages pursuant to Court Order.

A. **JOHN HOPKINS**:

1. Past medical expenses;
2. Past, present, and future emotional distress, pain and suffering due to permanent respiratory illness;
3. Loss of enjoyment of life due to permanent respiratory illness; and
4. Loss of spousal consortium.

B. **RUTH HOPKINS**:

1. Past, present, and future medical expenses;
2. Past, present, and future psychiatric and/or psychological care and treatment;
3. Past, present, and future pain and suffering and emotional distress due to respiratory illness;
4. Loss of enjoyment of life due to respiratory illness;
5. Loss of spousal consortium;

DATED this 24th day of June, 1994.

THOMAS C. PHELAN

s/_____
Thomas C. Phelan, WSBA #11373
Attorney for Plaintiffs Hopkins

PUBLISHER'S NOTE:

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The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et al., et ux.,	)
	)
Plaintiffs,	) No. 92-CS-0081-VS
	)
vs.	) SUMMARY OF
	) CLAIMS OF INJURY
GENERAL ELECTRIC, a foreign	) FOR PLAINTIFFS
corporation, and KAISER ALUMINUM	) DEBBIE WILLIAMS,
CORPORATION, a foreign	) KATHY FROESE,
corporation,	) DAN GLASS,
	) DAVID SCHUDEL,
Defendants.	) TIM SCHUDEL,
	) CRAIG THOMPSON,
	) AND SANDY
	) SCHUDEL

DEBBIE WILLIAM, KATHY FROESE, DAN GLASS, DAVID SCHUDEL, TIM SCHUDEL, CRAIG THOMPSON, and SANDY SCHUDEL, by and through their attorney of record, Craig F. Schauermann, hereby sets forth their summary of claims of damages pursuant to Court Order.

A. **DEBBIE WILLIAMS**: Permanent brain injury resulting in cognitive deficits, memory problems, loss of IQ, change in disposition, Organic Personality Syndrome, depression. Pulmonary injuries resulting in sensitivity to fumes, breathing

problems, increased susceptibility to bronchitis and other upper respiratory infections, aggravation of pre-existing problems, and Reactive Airway Disease Syndrome. Rash, dizziness, vomiting, tiredness, fear, pain and suffering, lethargy, emotional distress, medical bills, wage loss, loss of earning capacity, retraining expenses, and loss of the enjoyment of life.

B. **KATHY FROESE**: Pulmonary injuries, resulting in sensitivity to fumes, breathing problems, increased susceptibility to bronchitis and other upper respiratory infections, aggravation of pre-existing problems, Reactive Airway Disease Syndrome. Memory problems, change in disposition, headache and depression. Rash, dizziness, tiredness, lethargy, fear, pain and suffering, emotional distress, medical bills, loss of earning capacity, and loss of the enjoyment of life.

C. **DAN GLASS**: Memory loss, past and future pulmonary problems, including sensitivity to fumes, breathing problems, aggravation of pre-existing conditions, headache, rash, tiredness, lethargy, pain and suffering, irregular heart beat, emotional distress, fear, medical bills, and loss of the enjoyment of life.

D. **DAVID SCHUDEL**: Memory problems, change in disposition, depression, pulmonary injuries resulting in sensitivity to fumes, breathing problems, aggravation of pre-existing pulmonary dysfunctions, fear, headache, rash, irregular heartbeat, tiredness, lethargy, emotional distress, pain and suffering, medical bills, wage loss, retraining expenses, and loss of the enjoyment of life.

E. **TIMOTHY SCHUDEL**: Memory problems, change in disposition, depression, pulmonary injuries resulting in sensitivity to fumes, breathing problems, aggravation of pre-existing condition, fear, headache emotional distress, pain and suffering, medical bills, rash, dizziness, tiredness, lethargy, wage loss, retraining expenses, and loss of the enjoyment of life.

F. **CRAIG THOMPSON**: Memory problems, change in disposition, depression, pulmonary injuries resulting in sensitivity to fumes, breathing problems, aggravation of pre-existing condition, fear, headache, emotional distress, pain and suffering, medical bills, rash, dizziness, retraining expenses, and loss of the enjoyment of life.

G. **SANDY SCHUDEL**: Sandy Schudel contends that she has suffered a loss of consortium with her spouse.

DATED this 24th day of June, 1994.

SCHAUERMANN & THAYER

s/_____
Craig F. Schauermann, WSBA #7396
Attorney for Plaintiffs Schudel.
Glass, Howell, Thompson & Guaragna

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife and the marital community composed thereof; KATHRENE RAE-HOWELL (FROESE); CRAIG A. THOMPSON; JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof. Plaintiffs-Appellees/ Cross Appellants. DEBORAH GUARAGNA (WILLIAMS). Appellee. v. GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation. Defendants-Appellants/ Cross Appellees.	Nos. 94-36250 / 95-35010 BRIEF IN SUPPORT OF MOTION TO DISMISS (WITH ATTACHMENTS)

The General Electric Company and Kaiser Aluminum and Chemical Corporation [hereinafter, collectively, "General Electric"] move to dismiss these cases on the ground that no final judgment existed at the time the parties noted their appeals. This Court therefore lacks appellate jurisdiction. See Fed. R. App. P. 4; 28 U.S.C. § 1291.

INTRODUCTION

The parties' appeals were taken from the November 25, 1994, Order of the district court which directed, on post-trial motions filed by General Electric: (1) that judgment be entered as a matter of law in favor of General Electric on the claims of four of the ten plaintiffs; (2) that a new trial be held on the claims of another four of the ten plaintiffs; and (3) that the jury verdict be upheld as to one plaintiff. See CR 571.[7] The district court Order failed to address the claims of the tenth plaintiff. See id.

As is clear from this summary, the district court's November 25 Order did not dispose of all claims of all parties. General Electric thereafter timely moved in the district court, pursuant to Fed. RS. Civ. P. 60(b) and 59(e), to alter or amend or correct the Order, in part to obtain judgment on the tenth, unaccounted for, plaintiff. CR 574, 575. General Electric also moved for certification under Fed. R. Civ. P. 54(b) so that the parties could appeal appropriate portions of the Order (i.e., those portions which fully resolved the claims of any plaintiff).[8] CR 574, 575. All plaintiffs objected to General Electric's Rule 54(b) proposal, CR 591, 592, 593, and all plaintiffs countered with their own motion for certification under Rule 54(b), CR 577, 578. (The Rule 54(b) certification dispute arose because General Electric sought certification only as to those parties whose claims

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[7] General Electric previously filed the District Court's November 25, 1994 Order in its entirety in response to plaintiff-appellants' motion to dismiss and motion for remand.

[8] Federal Rule of Civil Procedure 54(b) provides that, In actions involving more than one claim or multiple parties, "the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

were finally resolved, while plaintiffs sought "certification" as to everyone -- even those against whom judgment was not entered but who instead faced a new trial.) In addition, two of the four plaintiffs who were ordered to submit their claims by way of a new trial moved for reconsideration or clarification of the Order pursuant to Fed. Rs. Civ. P. 60 and 59(e). CR 580, 581. While all of these motions were pending, plaintiffs -- excepting the sole prevailing plaintiff Deborah Williams -- noticed this appeal, ostensibly pursuant to Fed. R. App. P. 4. CR 584. As a protective measure, General Electric then noticed a cross-appeal. CR 589. These cross-appeals comprise the present action.

ARGUMENT

I. The Appeals Were Taken From A Non-Final Order Which Adjudicated Fewer Than All Claims And The Rights Of Fewer Than All Parties

Federal Rule of Appellate Procedure 4(a)(1), read in conjunction with the jurisdictional provisions of 28 U.S.C. § 1291, requires that the appealing party notice his appeal "within 30 days after the date of the entry of judgment." Because there was no final judgment here, the parties' appeals were not and are not ripe for review. E.g., Frank Briscoe Co. v. Morrison-Knudsen Co., 776 F.2d 1414 (9th Cir. 1985) (appeal dismissed in absence of clear Rule 54(b) findings); Baker v. Limber, 647 F.2d 912, 916 (9th Cir. 1981) (final judgment as to one, but not all, defendants was not ripe for appeal absent the express determinations required by Rule 54(b)); Chacon v. Babcock, 640 F.2d 221, 222 (9th Cir. 1981) ("[W]ithout a Rule 54(b) certification, orders granting partial summary judgment are non-final"); Sanchez v. Breed, 464 F.2d 448 (9th Cir. 1972) (dismissing appeal where failure to comply with Rule 54(b)); Atterbury v. Carpenter, 310 F.2d 126 (9th Cir. 1962) (same). Plainly, the district court's November 25 Order, to which these appeals were directed, was not a final Order under the federal rules. Accordingly, the appeals are jurisdictionally defective.

2. The Premature Appeals Are Not "Saved" By The District Court's Recent Rule 54 Certifications

On January 17, 1995, approximately four weeks after plaintiffs noticed their appeal (and General Electric its protective cross-appeal), the district court ruled on the parties' motions to alter or amend or correct the Order and motions for Rule 54 certification. CR 600. The district court directed: (1) that final judgment be entered as a matter of law in favor of General Electric on the claims of the tenth plaintiff; (2) that the parties' varied requests for alternative substantive relief be denied; (3) that final judgment be entered and Rule 54 certification issue for six plaintiffs; and (4) that no final judgment be entered for four plaintiffs, who nevertheless would have the right to appeal the limited question of the district court's jurisdiction to hear General Electric's post-trial arguments (citing Eaton v. National Steel Products Co., 624 F.2d 863, 864 (9th Cir. 1980)).[9] CR 600.[10] On the question of "judgment" as to the latter four, the Court explicitly held:

> In its order, the Court ruled that these four plaintiffs . . . could not recover damages for certain (alleged) injuries. The judgments which had been entered in their favor were vacated, and a new trial was ordered. In other words, the order limited damages, but left their negligence claims otherwise unresolved pending a new trial. As a result, insofar as Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins are concerned, the order is not a final judgment.

Order at 4-5 (emphasis added) (citation omitted).

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[9] The Eaton exception allows the appellate court to review the authority of the district court in granting a new trial where its jurisdiction to do so is challenged, but does not permit review of the merits of that interlocutory order. See Eaton v. National Steel Products Co., 624 F.2d 863, 864 (9th Cir. 1980).

[10] General Electric previously filed the District Court's January 17, 1995 Order in its entirety as a Fed. R. App. P. 28(j) supplement in response to plaintiff-appellants' motion to dismiss and motion for remand.

All parties -- excepting again Ms. Williams -- noticed appeals from the January 17 Order and final judgment. CR 666, 669.[11] These later-filed appeals are the only jurisdictionally proper means by which to resolve the merits of the final judgment in this case. E.g., Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (timely notice of appeal is mandatory and jurisdictional); Bordallo v. Reyes, 763 F.2d 1098, 1101 (9th Cir. 1985) (same).

Plaintiff-appellants may argue that the premature appeals were somehow "validated" by the district court's subsequent Rule 54 certification and related Order. Federal Rule of Appellate Procedure 4(a)(2) provides that a "notice of appeal filed after the court announces its decision or order but before the entry of judgment or order is treated as filed on the date of and after the entry." In this case, however, the late certification did not imbue the earlier Order with finality.

The Supreme Court has made clear that Federal Rule of Appellate Procedure 4(a)(2) "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by entry of judgment." FirsTier Mortg. Co. V. Investors Mortg. Ins. Co., 498 U.S. 269, 276 (1991) (emphasis in originals). In other words, a "premature notice of appeal is valid when '[a]ll that remained was the clerk's ministerial task of entering a Rule 58 judgment.'" In re Jack Raley Construction, Inc., 17 F.3d 291, 294 (9th Cir. 1994) (dismissing appeal taken from order which did not completely adjudicate issues) (quoting American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810, 813 (5th Cir. 1993)).

Here, even if the district court had immediately entered Rule 54 certification and the clerk had immediately entered the judgment, the November 25 decision would not have been then

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[11] The parties' newly filed Notices of Appeal are attached hereto as Exhibits 1 and 2. Plaintiffs' new Notice of Appeal is defective to the extent it purports to be an "Amended Notice" in furtherance of this appeal. CR 669. Moreover, by observing that this "Amended Notice" was filed, General Electric does not waive any objections it may have to any procedural or substantive defect in the new notice or the new appeal. Certainly, the District Court's January 17 Order defines the appealable issues far more restrictively than plaintiffs suggest.

appealable as to five of the ten plaintiffs. First, no decision or judgment whatsoever existed as to plaintiff-appellant Sandra Schudel until January 17. On November 25, she had nothing from which to appeal. Second, no final judgment existed as to plaintiff-appellants John Hopkins, Ruth Hopkins, Kathrene Froese and Merlin Carlson (the four who face a new trial). See Order of January 17 at 5 (confirming that November 25 "order [was] not a final judgment" as to the four). The grant of a new trial "is an interlocutory order not appealable as a final judgment." Eaton v. National Steel Products Co., 624 F.2d 863, 864 (9th Cir. 1980); see Roy v. Volkswagenwerk Aktgiengesellschaft, 761 F.2d 670 (9th Cir. 1985) (Order granting new trial is not appealable); Gilliland v. Lyons, 278 F.2d 56, 58 (9th Cir. 1960) (same). In short, there was and is no basis for this Court to treat the premature notices of appeal as having been timely filed pursuant to the later, final Order.

Since FirsTier, this Court has confronted jurisdictional defects which closely approximate those found here and has methodically dismissed the premature appeals. In Serine v. Peterson, 989 F.2d 371 (9th Cir. 1993), for example, plaintiffs noticed their appeal from a magistrate's recommended dismissal. The recommendation was not a final or appealable order and the notice of appeal was therefore. Although the district court later entered final judgment based on the recommended dismissal, this Court dismissed the appeal. Applying FirsTier , this Court explained that because the appealed-from order could not itself form the basis of a final judgment without further action or developments, the premature notice could not be cured by subsequent entry of judgment. 989 F.2d at 372-73. In In re Jack Raley Construction, this Court likewise dismissed an appeal taken by premature notice. 17 F.3d at 294-95. The premature notice was not valid because one issue before the district court (in that case, the question of pre-judgment interest) was not adjudicated in the order from which the appeal was taken. Id.

FirsTier and its Ninth Circuit progeny mandate dismissal here, because the district court's November 25 Order – which left the claim of one plaintiff completely unresolved and which merely ordered new trials as to another four plaintiffs – could not itself form the basis of a final judgment without further action.

3. General Electric Is Entitled To Proceed On A Jurisdictionally Correct Appeal On Those Limited Claims Certified By The District Court Or Otherwise Appealable

Although the issue raised is a jurisdictional one, General Electric also notes that the dismissal of the present appeal in favor of the later-taken one is an equitable result and is more than a bow to clerical formalities. The nine plaintiff-appellants purport to raise dozens of "issues" in this appeal, but none of the nine had a final judgment, one of the nine was not subject to judgment at all, and four of the nine are restricted to only an Eaton-based timeliness challenge. The procedural quagmire – unilaterally created by plaintiff-appellants – can best be avoided by dismissal of the premature appeals. Proper appellate procedures remain available, and there is no prejudice to any party entitled to be before this Court. See In re Jack Raley Construction, 17 F.3d at 294 ("prudent course of action is merely to file a fresh appeal after entry of final judgment").

Finally, General Electric notes that "Rule 4(a)(2) was intended to protect the unskilled litigant who [1] files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, [2] while failing to file a notice of appeal from the actual final judgment." FirsTier, 498 U.S. at 276. In this case, neither consideration exists. Plaintiffs knew the November 25 Order did not constitute an appealable final judgment; hence, plaintiffs themselves filed (but did not await resolution of) a motion for Rule 54(b) certification as well as an objection to General Electric's request for a more limited Rule 54(b) certification. CR 577, 578, 591, 592, 593. See In re Jack Raley Construction, 17 F.3d at 294 ("We are unwilling to conclude that the Appellants were lulled into the reasonable but mistaken belief that their August 13 notice of appeal was efficacious. . . . Theirs was not a casual objection to the proposed order of judgment proffered by the [Appellee]."); Serine, 989 F.2d at 372 ("Plaintiff himself betrayed his awareness of this fact by filing objections to the magistrate judge's order in the district court."). Moreover, plaintiffs have now filed what they style an "Amended Notice of Appeal" directed to the later Order. CR 669. Plaintiffs simply do not need – and are not entitled to – the "protection" of Rule 4(a)(2).

CONCLUSION

The district court did not render a decision on November 25, 1994, that either (1) was then-appealable or (2) would have been appealable if immediately followed by the entry of judgment. The notices of appeal directed to that November 25 Order were therefore premature and the jurisdictional defect was not cured by entry of the later Order. The appeals must be dismissed.

DATED this 31st day of January, 1995.

SPRIGGS & HOLLINGSWORTH
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By: s/_____
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By: s/_____
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Attorneys for the General Electric Company and Kaiser Aluminum and Chemical Corporation

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NOS. 94-36250
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	)	NO. CS-92-0081-FVS
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	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	
	)	
	)	
	)	
	)	
Defendants-Appellees.	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANT CARLSON'S MOTION TO REMAND FOR LACK OF DISTRICT COURT JURISDICTION AND STAY OF SCHEDULE (FRAP 9TH CIR. 27.11)

Marcia M. Meade
Dawson & Meade
W. 1300 Dean Ave.
Spokane, WA 99201-2015
Telephone: (509) 328-4266
Attorney for Plaintiff-
Appellant Carlson

I. RELIEF SOUGHT

Appellant, Merlin Carlson, Jr., moves to remand this matter herein based on lack of District Court jurisdiction and waiver of General Electric Company and Kaiser Aluminum and Chemical Corporation to jury trial of issues and to stay the schedule pursuant to FRAP Cir. R. 27-11. Appellant moves to remand this matter to Federal District Court, Eastern District of Washington with instructions that the District Court reinstate the original judgment of July 13, 1994.

II. GROUNDS

Special interrogatories in a FRCP 49(a) verdict form were submitted without objection by the court to the jury. The jury was dismissed after it had consistently answered all the questions in the special verdict form. A judgment was entered on July 13, 1994 based upon the findings of the special verdict form. Appellees General Electric Company (G.E. herein) and Kaiser Aluminum and Chemical Corporation (Kaiser herein) neither submitted special interrogatories nor objected to the special verdict form submitted to the jury. Appellees G.E. and Kaiser have waived their right to a jury trial on a subdivision of damages. The District Court lacked jurisdiction to grant a new trial on the basis of the need for additional findings on damages under FRCP 49(a). Accord, Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th

Cir. 1991); McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989). Under FRCP 59(d) the Court, on its own initiative, may grant a new trial for any reason that a party may have moved for a new trial. G.E. and Kaiser lacked the legal power to request, so the District Court lacked jurisdiction. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); Peterman v. Chicago Rock Island and Pacific R. R. Co., 493 F.2d 88, 91 (8th Cir. 1974) cert. denied 94 S.Ct. 3072.

III. BASIS

This motion is based upon the files and records herein, the excerpts of the record filed contemporaneously herein, and the Memorandum of counsel.

DATED this _____ day of January, 1995.

DAWSON & MEADE

s/_____
Marcia M. Meade
Attorney for Appellant Carlson

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On January 17, 1995, I served the within

APPELLANT CARLSON'S MOTION TO REMAND FOR LACK OF DISTRICT COURT JURISDICTION AND STAY OF SCHEDULE (FRAP 9TH CIR. 27.11)

on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

James B. King
KEEFE, KING
& BOWMAN
W. 601 Main, 1102
Spokane, WA 99201

Joe G. Hollingsworth
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Thomas C. Phelan
Attorney at Law
806 Officers Row
Vancouver, WA 98661

Executed this 16th day of January, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof.	)	NOS. 94-36250
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Plaintiffs-Appellants,	)	
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v.	)	
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GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation.	)	
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	)	
	)	
Defendants-Appellees.	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANT CARLSON'S MEMORANDUM IN SUPPORT OF REMAND, REINSTATEMENT OF VERDICT, AND STAY OF PROCEEDINGS UNDER CIR. R. 27-11.

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Telephone: (509) 328-4266
Attorney for Plaintiff-
Appellant Carlson

I. NATURE OF MEMORANDUM

Appellant Carlson submits this Memorandum in support of his Motion to remand to the District Court on the basis that the District Court lacked authority to vacate the verdict and order a new trial, and to vacate the schedule for record preparation and briefing pursuant to Cer. R. 27-11.

II. FACTS

This action was brought as a negligence action in State Court. CR 1, ER 2. Based on diversity it was removed to Federal Court. CR 1, ER 3. On February 28, 1994 the Court ordered Plaintiffs to: . . .(a) list each claim against the Defendants, including all theories of liability or causation. . . CR 326, ER 6. On March 7, 1994, Plaintiffs identified that they were making a claim for negligence. CR 327, ER 9, 10. An extensive list of Plaintiffs' theories of negligence and causation were provided. CR 327, ER 11-19.

The District Court found Merlin Carlson had sufficient evidence to support his negligence claim as it related to neurological damage. CR 327, ER 119-120. The evidence of neurological damage will be briefly addressed below, with the caveat that there was substantially more evidence than identified herein. The evidence is being identified for purposes of the application of the law of FRCP 49(a).

Merlin Carlson, along with the other Plaintiffs, was negligently exposed to hazardous chemicals. CR 476, ER 109. The exposure to hazardous chemicals occurred during a hazardous waste clean-up in Spokane, Washington. General Electric's own personnel, Dale C. Haskins, identified the plaintiff-worker's were exposed to hazardous chemicals. RT Vol. 36, ER 80-96. The jury found General Electric (hereinafter G.E.) and Kaiser Aluminum and Chemical Corporation (herein Kaiser) were negligent in exposing Merlin Carlson, Jr. CR 476, ER 109.

The exposure incident was investigated by the Washington State Health Department by Dr. Samuel Milham, Jr. and other government officials. RT Vol. 7, Exhibit 1, ER 49-50, 55-63. Dr. Milham's investigation was published in scientific peer review journal article published on this incident. Exhibit 1, ER 102-108. Dr. Milham testified as to his investigation of Merlin Carlson's injuries relative to his exposure to the hazardous chemicals. Dr. Milham identified the chemicals used were scientifically known to cause injury to human brains. Vol. 7, ER 52-53.

Dr. Daniel Goldstein testified extensively how these hazardous chemicals damage the cell structures of the human body, e.g. RT Vol. 3, ER 25-28, 34, 42-47. Dr. Goldstein testified Merlin Carlson, Jr., more probably than not, was injured by the negligent exposure to hazardous chemicals. RT Vol. 3, ER 29-33, 41, 48. Merlin Carlson's damages were very serious and affected all aspects of his life. RT 575, ER 41. There was extensive testimony from two neuropsychologists as to the effect Carlson's brain damage. RT Vol. 17, ER 66-73, Vol. 19, ER 74-75. As a result of the injury Carlson was unable to live independently. RT 312, ER 75.

Mr. Carlson had a $730,000 earning capacity loss as a result of his injury. RT Vol. 10, ER 97-99. Mr. Carlson was 24 years old at the time of the injury.

Mr. Carlson was a Blackfeet Native American. RT Vol. 22, ER 76. He had been training to be a medicine man for his tribe, since a child. As a result of his injury Mr. Carlson was no longer able to full file his desires and obligations as a medicine man for his tribe. RT Vol. 22, ER 76-79.

In addition to the evidence above there was extensive evidence through Dr. Paula Lantsberger as to her evaluation and treatment of Merlin Carlson. There was also extensive testimony as to the impact of the injuries on Mr. Carlson's day to day life. In addressing the jurisdictional issue it is not necessary for Mr. Carlson describe in detail the evidence from Dr. Lantsberger, lay witnesses and Mr. Carlson. Mr. Carlson does except and so appealed as to the District Court's finding that his evidence was insufficient as to other areas of injury.

The Court near the end of the trial asked that there be a listing of all the contentions as to the Plaintiffs. RT 11962-93. ER 100-101. Merlin Carlson's contentions were provided to the Court. CR 592, ER 121-122. The Court indicated that the contentions for Merlin Carlson were requested in connection with instructing the jury. RT 11692, ER 100.

At the close of the case approximately 5 days were spent by the Court and Plaintiffs' counsel in determining how the jury was to be instructed. At no time did Appellees G.E. or Kaiser request that there be special interrogatories propounded as to the sub-issues of damages.

The jury found in favor of Merlin Carlson on negligence. The jury made a specific factual finding as to Merlin Carlson's damages. CR 476, ER 109-110. Before the jury was released there was no request by G.E. or Kaiser that the jury subdivide the damages. A judgment in favor of Merlin Carlson was entered on July 13, 1994.

Unlike the other Plaintiffs, G.E. and Kaiser did timely serve Merlin Carlson's counsel with FRCP 50 and 59 Motions after business hours on the 10th judicial day. CR 486, 487, 488, 489, ER 110, 111, 112, 113. The tenth day, for purposes of any motion under FRCP 59, was July 27, 1994. The District Court did not provide notice under FRCP 59(d) to Merlin Carlson as to a new trial based upon the failure of jury findings on all of Carlson's theories of damages.

G.E.'s and Kaiser's post-trial Motions were based upon

twelve claimed errors of law. However, G.E. and Kaiser did not claim as error defects in the special verdict form. CR 571, ER 117-118. On November 22, 1994, the District Court sua sponte entered an order of a new trial for a factual determination as to the subdivision of damages. CR 571, ER 119-120.

III. SUMMARY OF THE ARGUMENT

The jury was dismissed after reaching a special verdict on Merlin Carlson's negligence claim on July 13, 1994. G.E. and Kaiser did not submit interrogatories, demand interrogatories, or object to the special verdict form submitted to the jury. Once the jury returned its verdicts neither G.E. nor Kaiser demand, nor did the District Court request, that the jury make additional findings before the jury was dismissed.

Under FRCP 49(a) G.E. and Kaiser waived any right to a jury trial as to a jury trial on the sub-issues of Merlin Carlson's damages. Once G.E. and Kaiser agreed to the Special Verdict form, which addressed all the basic elements of a claim of negligence and a defense of borrowed servant, Appellees-Defendants lack the power to move for a new trial for findings as to sub-issues on damages. The District Court lacked the authority to grant a new trial, when a party lacked the power to so move.

Under FRCP 56(d) the District Court lacked jurisdiction to order a new trial for determination of the sub-issues on damages. Therefore, the District Court lacked jurisdiction to order a jury trial on factual issues which have been waived by G.E. and Kaiser. This Court should remand this matter to the District Court with instructions to reinstate the judgment as to Merlin Carlson, Jr. of July 13, 1994.

IV. LAW

A. Standard of Review for Procedural Issues.

Jurisdictional issues, including issues of procedure such as a determination of whether a party waived a right to a jury trial on a sub-issue and the Court's motions under FRCP 56(d) are reviewed de novo. Westinghouse Electric Corp. v. Newman and Holzinger, P.C., 992 F.2d 932 (9th Cir. 1993); Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1262 (9th Cir. 1993);

Dubbs v. C.I.A., 966 F.2d 1114, 1118 (9th Cir. 1989); see also 2 Federal Procedure, L.Ed., Appeal, Sarschory, and Review, § 3:652 (1981).

B. Motions on the Court's Own Initiative, FRCP 59(d) are Jurisdictional.

FRCP 59(d) has three jurisdictional requirements before the District Court may grant a new trial on the Court's Motion.

The first requirement is timing. The Court may grant a new trial on its own motion is within ten days of the verdict. FRCP 59(d). The second sentence of FRCP 59(d) has been read to allow the District Court the opportunity to move for a new trial if timely motions for a new trial are pending before the court. See Notes of Advisory Committee on FRCP 59(d) 1966 amendment. The second jurisdictional requirement is that the Court may grant a new trial only for reasons that a party might move for a new trial. The third requirement is that the Court give the parties notice and an opportunity to be heard.

Merlin Carlson, Jr., although not served during business hours, his counsel was timely served with Motions and Memorandum under FRCP 50 and 59. Merlin Carlson, Jr. was not timely served with notice as to the time of the hearing in violation of LR 7(c). Even if one assumes timely service on Merlin Carlson, Jr., the District Court did not have jurisdiction under FRCP 56(d) to grant a new trial to subdivide the damage issue.

G.E. and Kaiser had waived the right to a jury trial on the sub-issue of damages. Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 890-91 (9th Cir. 1991). Once the jury was dismissed, after answering a special verdict form, G.E. and Kaiser had no right to a new trial on damages. McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989). If G.E. and Kaiser could not move for a new trial to address the sub-issues on damages, the jurisdictional requirement of "... for any reason for which it might have granted a new trial. . ." is absent. The District Court lost jurisdiction when G.E. and Kaiser waived the right, and therefore were barred from making motions for a new trial for determination of sub-issues on damages. Accord, Reorganized Church of Jesus Christ v. U.S. Gypsum, 882 F.2d 335, 338 (8th Cir. 1989).

The District Court failed to meet the third jurisdictional requirement of FRCP 56(d). The first Merlin Carlson, Jr. heard

of a new trial being granted to determine the sub-issues of damages was when the order of November 25, 1994, was received. Merlin Carlson, Jr. has been denied notice and an opportunity to be heard on the District Courts FRCP 56(d) motion.

The jurisdictional requirements of FRCP 59 are to be strictly construed. Brower v. Dir. Ill. Dept. of Corrections, 434 U.S. 257, 264-65, N.5, 54 L.Ed.2d 521, 98 S.Ct. 556 (1978); Peterman v. Chicago, Rock Island & Pacific Railroad Co.; and, McConnell v. Meba Medical and Benefit Plan, 778 F.2d 521, 526 (9th Cir. 1985). At a minimum two of the three jurisdictional requirements of FRCP 59(d) were lacking. The parties agreed to a special verdict form. The Court submitted it. The District Court was without power or authority to override the consistent findings of the special verdict. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 198, 110, 83 S.Ct. 659, 661, 9 L.Ed.2d 618 (1963).

C. Once a Party Waives the Right to a Jury Trial On an Issue, the Court does not have Authority to Sua Sponte Grant a New Trial on the Issues Waived.

FRCP 51 requires a party to object to the failure to give adequate jury instructions. Pau v. Yosemite, 928 F.2d 880, 890-91 (9th Cir. 1991). G.E. and Kaiser failed to request or object to the lack of special interrogatories as to each factual theory of Merlin Carlson's damages. It was G.E. and Kaiser's duty to request such questions. McCord v. Maguire, 873 F.2d at 1271, 1274 (9th Cir. 1989), amended opinion 885 F.2d 650. The form of the special verdict is to be decided before closing arguments so the Court may structure its instructions accordingly. Landes Const. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365, 1374 (9th Cir. 1987). In the post-trial motion, it was too late for G.E. and Kaiser, hence, the District Court was too late to submit sub-issues on damages to a jury.

Fed. R. of Civ. P. 49(a) provides the District Court with wide discretion in the content and submission of special verdict forms. See Landes Const. Co., 833 F.2d at 1374. The Court's discretion ends with the arrival of consistently answered special verdicts. Gallick, supra.

Before the special verdict form was submitted to the jury, the District Court had the authority to add special interrogatories or redraft the special interrogatories propounded. Here, before

trial Carlson had identified his theories of causation and submitted multiple offers of proof of his theories of causation and damages; during testimony Carlson presented multiple evidence of his injury and damages; and, before instructions Carlson provided a written list of all his contentions of damages. Carlson's theory of damages was not a mystery. The District Court and Appellees-Defendants were completely advised as to Carlson's damages. If the Appellees-Defendants or the District Court believed additional special interrogatories were need then, it was their duty to propose and demand them.

Carlson had no duty to submit special interrogatories on sub-issues of damages. Accord McCord, supra, amended opinion at 873 F.2d at 650. FRCP 49(a) clearly notifies parties and the Court that each party waives the right to a trial by jury on issues omitted unless before the jury retires the party demands its submission to the jury. The right being waived the District Court may not resurrect it. McCord, supra; Burgess, *infra*.

D. The Court had no Authority to Grant a New Jury Trial on Issues Waived by Appellees.

Neither G.E. nor Kaiser moved for a new trial based upon an omission from the special verdict form of sub-issues on damages. The District Court only has jurisdiction to grant a new trial for reasons which it might have granted a new trial on a motion for G.E. and Kaiser. Consenting to a special verdict, G.E. and Kaiser waived their right to move for a new trial based upon sufficiency of evidence to support all the theories of Merlin Carlson, Jr.'s damages. McCord v. Maguire; A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962).

G.E. and Kaiser waived their right to do so. Pau, supra at 928 F.2d at 891; and, FRCP 49(a). Once the right has been waived the District Court does not have the authority to give back the right waived. Burgess v. Premier Corp, 727 F.2d 826, 831 (1984).

The District court determined that there was sufficient evidence to support a jury verdict on the neurological theory of Carlson's claim for damages arising out of negligence. In those circumstances where a party has waived the right for a special verdict finding as to factual theories, the Court has consistently held a challenge for sufficiency of the evidence will not lie.

McCord v. Maguire, Piclet v. Piclet, 686 F.2d 1210, 1217 (7th Cir. 1982), cert. denied 103 S.Ct. 73 (1983).

A Court simply cannot choose to ignore a finding that is part of a special verdict. Gallick v. Baltimore & O.R.R. Co., 372 U.S. 108, 110, 83 S.Ct. 659, 9 L.Ed. 618 (1963). G.E.'s and Kaiser's failure to request special verdicts as to each factual theory of Carlson's damages prevent them from challenging the sufficiency of the evidence as to some but not all of the specific damages. McCord at 1274, Landes Const. Co., 833 F.2d at 374. Carlson provided his negligence claim with sufficient evidence of a neurological damage. The jury verdict had to be sustained. G.E. and Kaiser lacked the legal right, hence, the District Court lacked the authority to find fault with a consistent verdict.

E. Appellant Merlin Carlson Was Under No Obligation To Submit Additional Special Interrogatories.

Throughout this litigation G.E. and Kaiser have perpetrated confusion by suggesting an negligent injury to the brain is a separate claim from an injury to the lungs. Merlin Carlson has a negligence claim. The special verdict form covered all the elements of negligence. What part of Carlson's body manifesting the injury did not create separate claims of negligence.

Under Washington law the essential elements of actionable claims for negligence are: (1) the existence of a duty owed to the complaining party; (2) a breach thereof; (3) a resulting injury; and (4) a proximate cause between the claimed breach and the resulting injury. Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). There is no Washington law even suggesting individual manifestations of an injury in a single person creates separate negligence claims. What parts of Merlin Carlson's body and mind were injured are sub-issues of damage that were subsumed in special interrogatories, question no. 2 and question no. 3. CR 476, ER 110. Accord, McCord, 873 F.2d at 1274, Burgess v. Premier Corp., 727 F.2d 826, 831 (9th Cir. 1984).

FRCP 49(a) provides the means for parties and courts to direct the jury through all the elements constituting a claim for relief. The use of a special verdict under FRCP 49(a) comes with a clear warning as to the finality of the jury's findings. FRCP 49(a). The court must assume the jury consciously and correctly responded to each question and instruction. Gallick, supra. In

this case this means the District Court had to assume the jury consciously and correctly applied the law given to them on proximate cause. The District Court did not have the authority to assume the damage amount included assertions with insufficient proof.

F. FRCP 49(a) is viewed in The Context Of the Seventh Amendment.

In Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 110, 83 S.Ct. 659, 661, 9 L.Ed. 618 (1963), the application of a special verdict in the face of a party's multiple contentions was addressed. The Gallick Court of Appeals found on proximate cause that a party had not met its burden to sustain a special verdict. In reversing the Court of Appeals, the United States Supreme Court observed in Gallick, 372 U.S. at 107-108:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weights the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. (Cites omitted).

It is from this very basic premise embodied in the application of the 7th Amendment that the Gallick Court reviewed the court's jurisdiction after a special verdict form has been submitted.

The District Court findings as to Merlin Carlson, Jr. were reweighing of the evidence. Further, the District Court did not consider the clear law of Washington on what types of evidence are sufficient to support a jury verdict. Jurisdictionally, the

District Court was bound to Washington substantive law when considering the jury's findings under FRCP 49(a).

In arriving at its opinions, the District Court only utilized the law of O'Donoghue v. Riggs, 73 Wn.2d 814, 440 P.2d 823 (1968), addressed the standard of proof required in a medical negligence case. This was not a medical negligence case. McLaughlin v. Cook, 112 Wn.2d 829, 774 P.2d 1171 (1989), addressed the general Washington law identifying the nature of medical testimony needed. Under McLaughlin it is not required that a medical doctor state, unequivocally, that a particular condition in a patient is proximately related to the conduct of the defendant. Rather all the medical testimony at trial is considered. McLaughlin at 837. As long as there is medical testimony and the jury need not resort to speculation or conjecture about causation, the proof is sufficient.

Under Washington law medical causation includes consideration of more than specific opinions about particular conditions. The highest court in Washington recognized proximate cause of damage may come from lay witnesses. McLaughlin held at 112 Wn.2d at 837:

> It is not always necessary to proof every element of causation by medical testimony. If from the facts and circumstances in the medical testimony given, a reasonable person could infer the causal connection exists, the evidence is sufficient. Bennett v. Dept. of Labor & Industry, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

In Bennett, a previous Supreme Court opinion of Bitzan v. Parisi, 88 Wn.2d 116, 558 P.2d 775 (1977), was endorsed. Upon Bitzan, lay witnesses may testify to aspects of physical disability of an injured person that are observable by their senses and describable without medical training, and further the injured person can testify regarding the subjective aspects of injury and to the limitations to his physical movement. Bennett at 95 Wn.2d at 533 paraphrasing Bitzan.

Carlson submits the application of the broad law of McLaughlin, Bennett, and Bitzan would support a jury finding on all his theories of injury. It was in the context of this law that the District Court had a duty to review the sufficiency of Carlson's

evidence on injury and damage. Even under the more stringent O'Donoghue v. Riggs' law, the District Court found Carlson had sufficient evidence to support the jury's verdict of his neurological damages. CR 571, ER 119-120.

G. Difference to the Party's Agreement to FRCP 49(a) Special Verdict and the 7th Amendment Right Precluded a New Trial on Sub-Issues.

The language of FRCP 49(a) is unambiguous. The rule clearly defines what occurs, procedural, when a special verdict form is submitted to the jury. The pertinent language to the jurisdictional issue here is:

> 49(a). . .The court shall give to the jury such explanation and instructions concerning the matters thus submitted as may be necessary to enable the jury to make its finding upon each issue. If in doing so, the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issues so admitted unless, before the jury retires, he demands its submission to the jury. . .

See FRCP 49(a).

Here the District Court's FRCP 56(d) motion and order granting a new trial as to Merlin Carlson came about with a disregard of material jury findings on a special verdict form. The jury's findings on the special verdict form were consistent. The District Court did determine that there was sufficient evidence to support the jury's findings as to the neurological manifestations of Mr. Carlson's injuries. Our Supreme Court has addressed the limit of the court's authority when a special verdict under FRCP 49(a) has been answered by the jury. In Gallick v. Baltimore & Ohio R. Co., 372 U.S. at 119:

> But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364. We therefore must attempt to reconcile the jury's findings, by exegesis

> if necessary. . . . before we are free to disregard the jury's specical verdict and remand the case for a new trial. (Cites omitted).

The special verdict was consistent with a 24 year old male suffering the negligent infliction of a significant brain injury. The District Court lacked jurisdiction to find that the jury determined Merlin Carlson's injury from one or many different organs in his body.

V. CONCLUSION

G.E. and Kaiser did not submit, request, or object to the special verdict form. Before the jury was dismissed, the District Court had wide discretion as to the special verdict form. Once the jury was dismissed, the District Court had no discretion. The answers to the special verdict form were consistent. The answers covered all the elements of a claim of negligence. Under the clear, unambiguous law the District Court was bound to resolve the dispute consistent with the jury's answering of the special verdict form. The District Court had no jurisdiction to theorize as to what theory of Carlson as to damages the jury made its findings. For all the court knows, the jury may have only found for Mr. Carlson on his neurological injuries.

Merlin Carlson was 24 years old when he received a severe injury to his brain. He is unable to live independently. He is unable to be gainfully employed. He has lost the ability and capacity for fulfill his religious obligations as a medicine man for the Blackfeet Tribe. At verdict Mr. Carlson had five years of past injury and 45 years of future life. The consistent jury verdict of $2,775,768.00 for 50 years of severe brain damage and the loss of the ability to function as a normal human being is not unreasonable.

DATED this 16th day of January, 1995.

DAWSON & MEADE

s/_____
Marcia M. Meade,
Attorney for Appellant Carlson

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On January 17, 1995, I served the within

APPELLANT CARLSON'S MEMORANDUM IN SUPPORT OF REMAND, REINSTATEMENT OF VERDICT, AND STAY OF PROCEEDINGS UNDER CIR. R. 27-11.

on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

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Executed this 16th day of January, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof, Plaintiffs-Appellants.	)	NOS. 94-35145
	)	DC CV-92-0081-FVS
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation, Defendants-Appellees.	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANTS' SCHUDEL, GLASS, SCHUDEL, SCHUDEL, HOWELL (FROESE), THOMPSON, HOPKINS AND HOPKINS MOTION FOR REMAND AND FOR STAY OF SCHEDULE PURSUANT TO CIRCUIT RULE 27.11

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Appellants Hopkins

I. RELIEF SOUGHT

Appellants, David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, Katherine Howell (Froese), Craig Thompson, Ruth Hopkins, John Hopkins and Merlin Carlson, Jr., move to remand this matter based on:

(1) lack of District Court jurisdiction;

(2) waiver of General Electric Company and Kaiser Aluminum and Chemical Corporation to jury trial of sub-issues omitted from the Special Verdict Form; and,

(3)General Electric Company's and Kaiser Aluminum and Chemical Corporation's have failed to appeal (in regard to these Appellants) the District Court's rulings.

All Appellants request this matter be remanded to Federal District Court, Eastern District of Washington with instructions that the District Court reinstate the original judgment of July 13, 1994.

Appellants further move to stay the schedule pursuant to Fed. R. App. P. Cir. R. 27-11.

II. GROUNDS

There are three grounds for supporting the motion to remand. The grounds apply in different combinations to the

individual appellants.

1. Lack of Timely Service

Judgment in favor of all Plaintiffs-Appellants was originally entered on July 13, 1994. Defendants-Appellees General Electric Company and Kaiser Aluminum and Chemical Corporation, filed their Fed. R. Civ. P. 50 and 59 motions on July 27, 1994, (the 10th judicial day after judgment). Defendant-Appellees timely effectuated service of the Rule 50 and 59 motions on Appellant Carlson, only. (Appellant Carlson's counsel did not represent any of the other Plaintiff-Appellants). Defendants-Appellees failed to timely serve all of the other Plaintiffs-Appellants.

Defendants-Appellees in effecting service upon Plaintiffs-Appellants, Schudel, Glass, Schudel, Schudel, Thompson, Howell (Froese), Hopkins and Hopkins, counsels gave those pleadings to a private delivery service, "Federal Express," on July 27, 1994 (the 10th day) for delivery at a later date. Delivery did not occur until after the 10th day. There is no record of the actual date of service other than the assertion by Defendants-Appellees' counsel that the documents were given to a private delivery service on the 10th day with instructions that the motion be delivered the next day. In order to be timely, Fed. R. Civ. P. 50 and 59 motions must be served within 10 days of the entry of judgment. Service is not complete until actual delivery to the opposing party has occurred or the document has been properly deposited in the "mail." Fed. R. Civ. P. 5(b). The trial court has no jurisdiction to entertain an untimely served post-trial motion. Budinich v. Becton Dickenson and Company, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1462 (9th Cir. 1992). Despite this lack of jurisdiction, the trial court entertained the motions, granted Defendants-Appellees' motion for judgment dismissing the complaint of David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, and Craig A. Thompson and ordered a new trial for damages for Kathrene Rae Howell (Froese), John Hopkins and Ruth Hopkins.

2. Waiver of Rights to Issues Under Fed. R. Civ. P. 49(a).

The trial court also granted a new trial as to Merlin Carlson's damages. Merlin Carlson's motion for remand is not

based upon Fed. R. Civ. P. 5(b), but upon lack of jurisdiction under Fed. R. Civ. P. 59(d). Kathrene Howell Froese, Ruth Hopkins and John Hopkins join Merlin Carlson in this additional ground for lack of jurisdiction by the District Court.

The District Court lacked jurisdiction to initiate and grant a motion under Fed. R. Civ. P. 54(d) as to Carlson, Froese, Hopkins and Hopkins. Special interrogatories pursuant to Fed. R. Civ. P. 49(a) (Special Verdict Form) were submitted without objection by the court to the jury. The jury was dismissed after it had consistently answered all the questions in the special verdict form. A judgment was entered on July 13, 1994 based upon the findings of the special verdict form. Defendants-Appellees had a duty to object or submit special interrogatories under Fed. R. Civ. P. 49(a), rather Defendants-Appellees accepted the Special Verdict form as submitted and decided by the jury. Appellees General Electric and Kaiser waived their right to a jury trial on a sub-issues, including damages, because of their lack of objection to the Special Verdict Form used. Despite this waiver by Defendant-Appellees the District Court, sua sponte, four months after the original judgment was entered, granted a new trial Defendant-Appellees pursuant to Fed. R. Civ. P. 59(d). The District Court lacked jurisdiction to grant a new trial on the basis. Accord, Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th Cir. 1991); McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989).

Under Fed. R. Civ. P. 59(d) the Court, on its own initiative, may grant a new trial for any reason that a party may have moved for a new trial. General Electric and Kaiser Aluminum waived their right to pursue a Fed. R. Civ. P. 59(b) and (e) motions by their failure to object the Special Verdict Form. They therefore lacked the legal power to move for a new trial on this ground; hence, the District Court lacked jurisdiction to move and grant a new trial under Fed. R. Civ. P. 59(d). Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); Peterman v. Chicago Rock Island and Pacific R. R. Co., 493 F.2d 88, 91 (8th Cir. 1974) cert. denied 94 S.Ct. 3072.

3. Defendant-Appellees have not appealed.

The foregoing grounds for remanding this appeal have previously been made and addressed in motions to remand in the Ninth Circuit U.S. Court of Appeals, Docket No. 94-36250 for all

of the Appellants. In the interim, the status between the parties creates an additional ground for remanding this matter.

This is an action involving multiple parties, not multiple claims by an individual party. The claim made by all Plaintiffs-Appellants was negligence.

All of the Appellants-Plaintiffs have asserted an appeal from the District Court's lack of jurisdiction to enter the November 25, 1994 and January 17, 1995 orders. In making the time of "final" judgment crystal clear to all parties, Plaintiffs-Appellants timely moved for Fed. R. Civ. P. 54(b) certification.

On January 17, 1995 findings were made and 54(b) certification was granted. All of the Plaintiffs-Appellants herein timely filed an Amended and Notice of appeal of the District Court's November 25, 1994 and January 17, 1995 orders. On the other hand, Defendants-Appellees have failed to appeal or cross appeal from even the final Order of January 17, 1995. On January 17, 1995, it was clear a final order was being entered as to all Plaintiffs-Appellants' individual negligence claims.

Defendants-Appellees have failed to appeal any claimed error. The status of this record is that the Defendants-Appellees have not and, now, can not ask this Court to consider any other matter. There being no appeal by Defendants-Appellees this matter is ripe for remand for lack of the District Court' jurisdiction.

III. BASIS

This motion is based upon the files and records herein, the attachments of the motions and memorandum by Appellants in the Ninth Circuit U.S. Court of Appeals Docket No. 94-36250, contemporaneously herein, and the Memorandum of counsels.

DATED this 6th day of March, 1995.

DAWSON & MEADE

s/_____
Marcia M. Meade
Attorney for Appellant Carlson

SCHAUERMANN & THAYER

s/Marcia M. Meade for
Craig F. Schauermann
Attorney for Appellants Schudel, Glass, Schudel, Schudel, Howell (Froese), and Thompson

s/ Marcia M. Meade for
Thomas C. Phelan
Attorney for Appellants Hopkin and Hopkins

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On March 6th, 1995, I served the within

APPELLANTS' SCHUDEL, GLASS, SCHUDEL, SCHUDEL, HOWELL (FROESE), THOMPSON, HOPKINS AND HOPKINS MOTION FOR REMAND AND FOR STAY OF SCHEDULE PURSUANT TO CIRCUIT RULE 27.11

on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

James B. King
KEEFE, KING
& BOWMAN
W. 601 Main, 1102
Spokane, WA 99201

Joe G. Hollingsworth
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SCHAUERMANN & THAYER
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661

Thomas C. Phelan
Attorney at Law
806 Officers Row
Vancouver, WA 98661

Executed this 6th day of March, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON, TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NOS. 94-36250
	)	
	)	NO. CS-92-0081-FVS
	)	
	)	
	)	
	)	
	)	
	)	
	)	
Plaintiffs-Appellants	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,	)	
	)	
	)	
	)	
Defendants-Appellees	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANT CARLSON'S REPLY TO APPELLEE'S MEMORANDUM IN OPPOSITION OF REMAND

Marcia M. Meade
Dawson & Meade
W. 1300 Dean Ave.
Spokane, WA 99201-2015
Telephone: (509) 328-4266
Attorney for Plaintiff-
Appellant Carlson

I. NATURE OF MEMORANDUM

Appellant, Merlin Carlson, Jr., hereby replies to General Electric Company and Kaiser Aluminum Chemical Corporation (hereinafter collectively General Electric) brief in opposition to Carlson's motion for remand.

II. SUMMARY OF ARGUMENT

General Electric asserts the subject of the motion is a matter concerning merits rather than jurisdiction. Mr. Carlson disagrees.

General Electric agreed to a special verdict form. Under FRCP 49(a) General Electric waived the right to submit to another jury issues of injury and damage. The District Court initiated and entered its own order for a new trial. General Electric having waived its right, the District Court was without authority to grant a new trial on sub-issues of damages. General Electric did not appeal the District Court's denial of its motions, so questions of merit by General Electric are moot.

III. LAW

A. There is authority to support a remand based upon jurisdictional error.

General Electric argues:

"Mr. Carlson has not cited any authority, and there is none, in support of his attempted circumvention of the briefing rules."[12]

Mr. Carlson has and does cite authority for his Motion to Remand for Lack of Jurisdiction. FRCP 49(a) and FRCP 59(d) are authority. FRCP 49(a) deprives the District Court the jurisdiction to submit "issues so omitted" from the special verdict form to another jury. *See* FRCP 49(a). Under FRCP 59(d) the District Court's jurisdiction is limited to specific circumstances. The District Court's authority is limited to its motions brought within 10 days of judgment and to reasons which it might have granted a new trial to a party. FRCP 59(d).

The District Court did not move on its own initiative within 10 days of the judgment. Simply, if the parties may not move, the District Court may not move on its own initiative for a new trial. The District Court did not have authority to act, because the parties removed the issue from the District Court's jurisdiction by operation of FRCP 49(a).

B. The Issue is a Matter of Law, Not Underlying Merit

A special verdict form was used. CR 476, ER 1.2. General Electric neither submitted, objected, or requested an additional question on injury or damage to Mr. Carlson. General Electric removed from the District Court's jurisdiction all rights to submit sub-issues of neurological or non-neurological damages. FRCP 49(a). FRCP 49(a) is clear and unambiguous--questions not submitted to the jury are waived by all the parties. FRCP 49(a). General Electric has waived the right to another jury deciding the damages as to neurological and non-neurological damages. The fact of the special verdict is undisputed.

Jurisdictional challenge is not merit dependent. Merlin Carlson, Jr. has identified the District Court did not have jurisdiction to give back what General Electric waived under FRCP 49(a). Jurisdictionally, when General Electric waived its right, the District Court lost jurisdiction to order on its own initiative a new trial to decide sub-damage issues. The fact of the District Court denial of General Electric's motion for a new trial

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[12]See General Electric's "Response Brief in Opposition to Appellant Carlson's Motion For Remand" at page 4 ¶ 1

and the District Court initiation and entry of its own order for a new trial, can not be disputed. The order speaks for itself. CR 571, ER 12.

If the facts are undisputed it is a question of law. A pure question of law on jurisdiction can present on a motion. U.S. v. Nukida, 8 F.3d 665 (9th Cir. 1993). When underlying merit is not an issue the interests of judicial economy permits resolution on motion. Nukida at 670. If jurisdiction was fact dependent and the facts were in dispute, then a full hearing would be necessary. Nukida at 669. A full appeal is not necessary, because the jurisdictional issues are not fact dependent.

C. The Record Does Not Bear Out General Electric's Contentions or Arguments.

Here, jurisdiction is not fact dependent. Jurisdiction can and should be decided, now. General Electric suggest there are questions of merit, when it states in its Responsive Memorandum:

> "The District Court agreed, struck much of Mr. Carlson's evidence and granted General Electric a new trial with respect to Mr. Carlson's claim. CR 571."[13]

This statement is not true. CR 571, ER 6-7,11-12. Mr. Carlson's evidence was not "struck". CR 571, ER 6-7, 11-12. The District Court did not grant General Electric's motion for a new trial, but rather the District Court initiated and entered its own order for a new trial. CR 571, ER 9,10,12. General Electric went on to state:

> "Because [the new trial] the order was squarely grounded on General Electric's motion, the lower court had jurisdiction to enter it.[14]

The District Court's ruling is contrary to General Electric's assertion. It was made very clear the new trial was not grounded in General Electric's motion, when the District Court ruled:

> "...The defendants are granted judgment as a matter of law on all non-neurological claims asserted by Merlin

---

[13]See footnote 1 Supra, at page 4 ¶ 2.
[14]See footnote 1 Supra, at page 4 ¶ 2.

Carlson. Those claims are dismissed with prejudice. ... The defendants are granted a new trial on all remaining claims.

6. **THE DEFENDANTS' MOTION FOR A NEW TRIAL OR ALTERNATIVE RELIEF (Ct. Rec. 486) IS DENIED.**

(Emphasis Added)" See CR 571, ER 12.

The ruling is clear. The new trial was granted on the District Court's FRCP 59(d) motion and not General Electric's motion. The order granting a new trial absolutely was not squarely grounded on General Electric's motion.

General Electric cites Southern Pac. Co. vs. U.S. District Court, 190 F.2d 735 (1951) as supportive of its position. In Southern Pac. Co. it was specifically found the Court did not grant a new trial under FRCP 59(d). The authority General Electric cites is not applicable to the indisputable order, hence record, herein. Pau v. Yosemite Park and Curry Co., 928 F.2d 880 (9th Cir. 1991) and Stradley v. Cortez, 518 F.2d 488 (1975) are authorities which do apply to the record herein. Pau and Stradley answer affirmatively for Mr. Carlson's position the jurisdictional question.

D. On this record General Electric's Challenge Directed to It Questions of Merit Are Moot.

General Electric urged Mr. Carlson's appeal was premature. Since filing the motion for remand the District Court has certified this matter as appealable. CR unknown, ER 15,16. Further, the District Court recognized challenges to the jurisdiction on granting a motion for new trial are immediately appealable. See Eaton v. National Steel Products Co., 624 F.2d 863, 864 (9th Cir. 1980). CR unknown, ER 16.

Under FRCP 59(d) the District Court's authority was limited to "reasons for which it might have granted a new trial on motion of a party." FRCP 59(d). FRCP 49(a) constrained General Electric from moving for a new trial on non-neurological and neurological damages. The District Court was likewise constrained. FRCP 59(d) General Electric has not appealed the denial of its motion for a new trial on other matters. There are no questions of fact as to the application of FRCP 59(d) in this case. There is no question of fact as to the status of the appeal. The

issue is purely a question of law.
General Electric infers the following as to the Motion to Remand:

> "[T]he argument that the Court erred in granting General Electric the relief which it requested does not rise to a 'jurisdictional' argument so as to preclude resolution with full briefing on the merits."[15]

Mr. Carlson appealed the District Court's new trial ruling. CR 584, ER 14. General Electric did not appeal the District Court's denial of its new trial ruling. General Electric did not appeal the District Court's denial of its motion to dismiss Mr. Carlson's neurological damages. Now and forever the merits of the neurological vs. non-neurological damages to Mr. Carlson as to General Electric are not pertinent. The question is purely of whether the District Court had jurisdiction to grant a new trial on sub-issues of damages.

The issue, now, is purely jurisdictional. Either the District Court had authority to grant a new trial on what was waived by General Electric or the District Court did not have the authority. The application of FRCP 49(a) and FRCP 59(d) created a purely jurisdictional question. Here, the application of FRCP 59(d) and FRCP 49(a) have not created questions of merit.

IV. CONCLUSION

The application of FRCP 49(a) and FRCP 59(d) do not involve discretion. The questions posed on Mr. Carlson's Motion are purely questions of law. If the District Court did not have jurisdiction then the November 25, 1994, order was void as to Merlin Carlson, Jr. Neither General Electric Company nor Kaiser Aluminum and Chemical Corporation have appealed the November 25, 1994, order. Very Simply, Merlin Carlson, Jr. wants his judgment on the verdict reinstated. A special verdict form was submitted and used, so appeals such as this could be avoided. In the interest of judicial economy and due process Mr. Carlson urges it is expeditious to dispose of this matter on a motion to remand with directions to reinstate the judgment upon

---

[15]See footnote 1 Supra page 4 ¶1.

the verdict in Mr. Carlson's favor.
DATED this 2ND day of February, 1995.

DAWSON & MEADE

/s/_____
Marcia M. Meade, WSBA 11122
Attorney for Appellant Carlson

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On February 2nd, 1995, I served the within

APPELLANT CARLSON'S REPLY MEMORANDUM TO APPELLEES' MEMORANDUM IN OPPOSITION TO REMAND

on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

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806 Officers Row
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Executed this 2nd day of February, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NOS. 94-36250/ 95-35010
	)	DC CV-92-0081-FVS
Plaintiffs-Appellants,	)	
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	
Defendants-Appellees.	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANTS-PLAINTIFFS' AND APPELLEE GUARAGNA'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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Appellants Hopkins

I. NATURE OF MEMORANDUM

Appellees, General Electric Company and Kaiser Aluminum and Chemical Corporation (hereinafter collectively referred to as General Electric) made a generic motion to dismiss all of Appellants-Plaintiffs' Appeals for want of jurisdiction. Appellants will show this Court does, now, have jurisdiction. Appellants, Glass, Thompson, Schudel, Schudel, Schudel, Howell Froese, Hopkins and Hopkins have a common jurisdictional basis for appeal. (hereinafter Schudel, Schudel, Schudel collectively referred to as Schudels.) (hereinafter Hopkins and Hopkins collectively referred to as Hopkins). Appellants Froese and Hopkins have an additonal jurisdictional basis that is also common to Appellant Carlson.

II. SUMMARY OF THE ARGUMENT

General Electric has not meet its burden to show this Court lacks jurisdiction.

General Electric failed to timely serve Fed. R. Civ. P. 50 and 59 motions, so the District Court lacked jurisdiction to consider these post-trial motions as to Schudels, Glass, Thompson, Froese, Hopkins and Guragana. The District Court lacking jurisdiction, this Court, now, does have jurisdiction under the controlling authorities.

Under Fed. R. Civ. P. 49(a) and 59(d), Appellant Carlson, along with Froese and Hopkins, have another jurisdictional basis of appellate jurisdiction. General Electric waived the right to challenge the special verdict on omitted sub-issues. Since General Electric lacked the right to move for a new trial on omitted issue, the District Court could not acquire that basis under Fed. R. Civ. P. 59(d). Without the authority to act the District Court lacked the jurisdiction to order a new trial on omitted sub-issues for Carlson, Froese and Hopkins.

The Appellants' appeals should not be dismissed. Rather Appellants' motions to this Court, to remand and instruct that the November 25, 1995, order and January 17, 1995 orders be stricken, should be granted. The only enforceable judgment, now, remaining for all the Plaintiffs is that of July 13, 1994.

III. LAW

A. Standard of Review for Procedural Issues.

General Electric failed to identify the standard of review. Whether it is in District Court or in Appellant Court, jurisdiction is a question of law. U.S. v. Nukida, 8 F.3d 665, 669 (9th Cir. 1993). Jurisdictional issues, including issues of procedure such as determination of whether a party waived a right to a jury trial on a sub-issue and the Court's motions under Fed. R. Civ. P. 56(d), are reviewed do novo. Westinghouse Electric Corp. v. Newman and Holzinger, P.C., 9 92 F.2d 932 (9th Cir. 1993); Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1262 (9th Cir. 1993); Dubbs v. C.I.A., 966 F.2d 1114, 1118 (9th Cir. 1989); see also 2 Federal Procedure, L.Ed., Appeal, Sarschory, and Review, § 3:652 (1981).

B. Summary of Appeals filed by Appellants-Plaintiffs.

On July 13, 1994, a judgment on special verdicts was entered in favor of each plaintiff. CR 477, ER 22-25. An order and judgment of dismissals and new trials were entered on November 25, 1994. CR 571, 572, ER 27-31. Appellants-Plaintiffs filed a Notice of Appeal on December 21, 1994. CR 584, ER 34. Then Fed. R. Civ. P. 54 motions were pending. CR 577 ER 32-33. On January 17, 1995, the District Court entered an order on those motions. CR 600, ER 43. These Appellants-Plaintiffs filed an Amended Notice of Appeal on January 27, 1995. CR 669, ER 45. Appellants-Plaintiffs filed another Notice of Appeal on February 7, 1994. CR 676, ER 47-53.

C. Short Answer

In District Court and on appeals Appellants-Plaintiffs have asserted the District Court lacked jurisdiction to consider untimely served Fed. R. Civ. P. 50(b) and 59 motions on the judgment for Schudels, Glass, Thompson, Froese, and Hopkins. CR 676, ER 47-53 Appellant Carlson, as well as Hopkins and Froese, have asserted the District Court lacked jurisdiction under Fed. R. Civ. P. 59(d) to order a new trial to determine issues omitted from the Special Verdict form. See also Fed. R. Civ. P. 49(a). In its motion General Electric ignores these challenges to the District Court's jurisdiction.

Without reservation venerated law holds an order granting a new trial is reviewable as a final judgment when the district court's jurisdiction is challenged. Phillips v. Negley, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013 (1886); also see, Jones & Guerrero Co., Inc. v. Sealift Pac., 650 F.2d 1072, 1073 (9th Cir. 1981).

The District Court ruled that the order final based on the jurisdictional challenges. CR 600, ER 42, 43. Accord Eaton v. National Steel Production Co., 624 F.2d 863, 864 (9th Cir. 1980). Unlike General Electric, the District Court noted the general premise, that a order granting a new trial is interlocutory, has an exception when a new trial under Fed. R. Civ. P. 56(d) is challenged on jurisdictional grounds. Eaton at 864.

D. A Motion To Dismiss Is Improper Under the Record and Law.

In District Court General Electric had notice of jurisdictional challenges. In moving General Electric relies on Eaton v. Nat'l Steel Products Co. The Eaton Court clearly states the law at 624 F.2d at 864:

> Though an exception to this rule [new trial orders are interlocutory] has been recognized when the district court grants a new trail when it has not jurisdiction to do so. . . . (cites omitted).

In this case the District Court ruled jurisdictional challenges result in final decisions for purposes of appeal. Additionally, the District Court certified the order as to all Appellant-Plaintiffs under Fed. R. Civ. P. 54(b). Given the record why has General Electric moved to dismiss to dismiss the appeals, its included.

The judgment for Schudels, Glass, Thompson, Froese, Hopkins, and Guaragna was entered on July 13, 1994. When the post-trial motions were not timely served by General Electric as to those plaintiffs, the District Court lost jurisdiction to consider those post-trial motions. Additionally, the time for filing appeals was not tolled. The time for General Electric to file an appeal ran on August 12, 1994. Fed. R. App. P. 4(a). Thereafter, General Electric failed to file appeals as to Schudels, Glass, Thompson, Froese, Hopkins and failed to timely file as to Appellee Guaragana.

Only Appellant Carlson was timely served with the post-trial motions. On November 25, 1994, the District Court granted a new trial under Rule 59(d) on grounds not available to General Electric or the District Court. On November 25, 1994, the District Court specifically denied General Electric's motion for a new trial as to Appellant Carlson. Once the District Court ruled on the timely Carlson's motions, the appeals clock began ticking. Again, General Electric had notice of a jurisdictional challenge and the finality of the November 25, 1994, order. General Electric's time to file an appeal as to Carlson ran on December 27,

1994.[1] General Electric failed to file any appeal as to Carlson.

By January 17, 1995 all Appellants-Plaintiffs moved this Court to remand and instructed the District Court to strike the November 25, 1994, amended judgment; and, Appellee-Guaragna moved to strike the only appeal General Electric has filed for lack of jurisdiction. Thereafter General Electric only files an appeal as to Guaranga's judgment. In response to the order and these motions General Electric without acknowledging the jurisdictional challenges to the District Court's authority, moves to dismiss the Appellants-Plaintiffs appeals for lack of jurisdiction.

Perhaps General Electric's Motion to Dismiss is a veiled attempt bootstrap issues that General Electric is now time barred from bringing. On January 31, 1995, General Electric knew its failure to take mandatory appeals as to all 10 Plaintiffs. As General Electric noted "timely notice of appeal is mandatory and jurisdictional."[2] Having lost the opportunity to file an appeal as to any of the Plaintiffs, General Electric is using smoke and mirrors, rather than the record and the law, to gain a foot hold in District Court.

E. Appellee-Guargana has not appealed.

Appellee Guaragna did not appeal. Appellee Guaragna does not know why General Electric would move to dismiss its own appeal.

General Electric failed to toll the time for filing an appeal from the July 13, 1994, judgment by not timely filing Fed. R. Civ. P. 50(b) and Fed. R. Civ. P. 59 motions. General Electric was required to file a notice of appeal by August 12, 1994. General Electric has failed to meet that jurisdictional requirement. Appellee Guaragna has currently pending a motion to dismiss General Electric's appeal for lack of jurisdiction.

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[1] The time ran on December 25, 1994, but General Electric gained two days because of a holiday.

[2] General Electric's Memorandum in Support of Motion to Dismiss Appeal at page 6 citing as authority Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978).

F. The January 17 Order Certified Under Rule 54 All Plaintiffs' Right to Appeal

General Electric states: "On the question of 'judgment' as to the latter four [Hopkins, Hopkins, Froese and Carlson], the Court explicitly held . . ."[3] This is inaccurate and misleading. The District Court did not "hold" what General Electric asserts to this Court. Rather the District Court applied an "[a]nalysis" to Appellants, Hopkins', Hopkins', Froese's and Carlson's "[r]elief [r]equest". CR 600, ER 38,42, 43. Not only has General Electric improperly couched an "analysis" as an "holding", the analysis is offered out of its total context. General Electric's argument fails when the analysis is in context.

General Electric never explains why or how this Court can ignore the District Court's recognition that:

> . . . An order granting a new trial is interlocutory. As a general rule, it is not appealable under 28 U.S.C. § 1291. Roy v. Volkswagenwerk Aktiengesellschaft, 781 F.2D 670, 671 (9th Cir. 1985); Eaton v. National Steel Products Company, 624 F.2d 863 (9th Cir. 1980). There is an exception to that rule, however. An order granting new trial may be appealed if the district court no longer had jurisdiction to do so. See Eaton, 624 F.2d 864. (Emphasis Added)

General Electric fails to explain why or how this Court can ignore:

> **"IT IS HEREBY ORDERED:**
>
> 4. The parties' respective motions for Rule 54(b) certification (Ct. Recs. 574, 577) are granted:
>
> (a) There is no just reason to delay appellate review of the Court's Order Re Post-Trial Motions (Ct. Rec. 571); and
>
> (b) Since the Clerk has already entered judgment

[3] Footnote 4, supra at p. 5.

(Ct. Rec. 572) will become the final judgment for purposes of Rule 54(b) upon entry of this order. . ." CR 600, ER 43, CR 577, ER 32-33.

There is no record nor controlling precedent to support General Electric's argument that Appellants-Plaintiffs' Notice of Appeals were not valid, timely and now permissible.

G. Analysis of Appellants-Plaintiffs' Right to Appeal Is Individually Determined

General Electric suggests all the Plaintiffs actions must be disposed of before any matter is final, citing Briscoe Co. v. Morrison-Knudsen Co., 776 F.2d 1414 (9th Cir. 1985). On this record General Electric's position is illogical. See Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 100 S.Ct. 1460, 64 L.Ed.2d 1(1980). All of the Appellants-Plaintiffs' negligence actions were independent of one another. CR 476, ER 1-21. Each of the Plaintiffs' negligence claim was tried individually and was self-contained. The facts of the Plaintiffs' cases maybe interrelated, but the legal causes of action were not related.

H. Fed. R. App. P. 4(a)(2) applied to the November 25, 1995, Order.

General Electric suggest Appellants-Plaintiffs are not entitled to the employ Fed. R. App. P. 4(a)(2) based on its application of First Tier Mortgage Co. v. Investor's Mort'g Ins. Co., 498 U.S. 269, 112 L.Ed. 743, 111 S.Ct. 648 (1991). Appellants-Plaintiffs specifically challenged whether the District Court had jurisdiction to amend or modify the July 13, 1994, order. According to controlling precedent of Phillips v. Negley and Gallick v. Baltimore & Ohio,[4] the November 25, 1994, Order "would be appealable if immediately followed by entry of judgment." Accord First Tier 498 U.S. at 276. An order without jurisdiction would immediately be appealable following entry of judgment. It has been specifically and consistently recognized that 28 U.S.C. § 1291 jurisdiction is acquired, when the District Court

[4]372 U.S. 198, 110, 83 S.Ct. 659, 661, 9 L.Ed.2d 618 (1963).

without jurisdiction attempts to amend or modify a previous judgment. See Eaton, supra 624 F.2d at 864 citing Stradley v. Cortez, 518 F.2d at 491 (where there was lack of jurisdiction to act under Fed. R. Civ. P. 59(d)).

Fed. R. App. P. 4(a)(2) permits a notice of appeal from a non-final decision to operate as a notice of appeal from the final judgment, when there is decision that would be appealable if immediately followed by entry of judgment. First Tier 498 U.S. at 276. The Supreme Court observed of Rule 4(a) in First Tier 498 U.S. at 273:

> The rule [4(a)] recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee and that the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal.

The Supreme Court stressed the Rule allows a notice of appeal to relate forward, if there is no surprise or unfairness to the appellee. First Tier at 276-77. General Electric never explains how relating the December 21 forward would prejudice, surprise or be unfair to General Electric.

General Electric suggest it was a surprise that Sandra Schudel would appeal the dismissal of her loss of consortium claim, when her husband's primary claim was entirely dismissed. Even if General Electric was surprised the matter is now moot by the filing of the February 7, 1995, appeal.

General Electric suggest Fed. R. App. P. 4(a)2 is unavailable to Appellants-Plaintiffs, because they are not unskilled litigants, who filed a notice of appeal from decision they reasonably but mistakenly believed to be final.[5] There is no authority suggesting Rule 4(a)2 is only available to unskilled litigants. This "protection" of unskilled litigants may be one purpose of the Rule, but it is not the only purpose. See Advisory Committee's Note Fed. R. App. P. 4(a)(2).

General Electric's argument on Rule 4(a)(2) is specious on two further grounds. The Notices of Appeal were filed after written orders and filed judgments, hence factually, In Re Jack

[5]General Electric's Memorandum in Support of Motion to Dismiss at pp.9-10.

Raley Const., 17 F.3d 291 (9th Cir. 1994) is not applicable to this case. The Notice of Appeal were not filed from a Magistrates ruling, hence procedurally, Serine v. Peterson, 989 F.2d 371 (9th Cir. 1993), is not germane here.

I. When a Party Fails To Timely Served Post-Trial Motions The District Court is Without Authority To Act. A Party May Appeal When The District Court Act Without Authority

Except for Carlson, none of the Plaintiffs were timely served with General Electric's Fed. R. Civ. P. 50(b) and Fed. R. Civ. P. 59 motions. Through out Schudel, Glass, Thompson, Froese and Hopkins have maintained the District Court lacked jurisdiction to amend or modify the July 13, 1994 judgment. Jurisdiction for these nine Appellants to file an appeal on December 21 was conferred by the controlling precedent of Phillips v. Negley, 117 U.S. at 673. Also See Demeretz v. Daniels Motor Freight, Inc. 307 F.2d 469, 471 (1962); and, Eaton, supra, 864.

J. Under Fed. R. App. P. 4(a)(2) and (4) When A Claim is Totally Dismissed Against All Defendants This Court Has Jurisdiction

Five of the Appellants, Schudels, Glass, and Thompson, had their respective claims dismissed in entirety by an order of dismissal and by a written amended judgment entered on November 25, 1994. Under Fed. R. App. P. 4(a)1 the Appeal of December 21, 1994, was timely and not premature. Under Fed. R. App. P. 4(a)2 at most the order of January 17, 1995, treated the December 21, 1994, as if it was filed on January 17, 1995. Under Rule 4(a)4 the December 21, 1994, Notice of Appeal was still in effect by the timely filing of an Amended Notice of Appeal on January 27, 1995. Finally, under Fed. R. App. P. 4(a)1 this Court undoubtedly has jurisdiction on another Notice filed on February 7, 1995.

K. When a District Court Lacks Jurisdiction Under Fed.R. Civ. P. 59(d) To Grant A New Trial It Is A Final Appealable Matter

The three Appellant. Hopkins. Hopkins and Froese. share the additional jurisdictional basis with the remaining Appellant. Carlson. Under Fed. R. Civ. P. 49(a) and 56(d) the District Court did not have jurisdiction to order a new trial for Appellants. Hopkins. Froese or Carlson. Stradley. supra 491. McCord v. Maguire. 873 F.2d 1271. 1274 (9th Cir. 1989). amended opinion 885 F.2d 650. On this jurisdictional issue it is controlling that the new trials were granted under Fed. R. Civ. P. 59(d) and not 59(b) or (c).

General Electric moved on numerous grounds for a new trial or an alternative relief under Fed. R. Civ. P 59(b). CR 486. ER 26. On November 25. 1994. the District Court then moved on different grounds under Fed. R. Civ. P. 59(d) to ordering a new trial for omitted sub-issues of damages for Hopkins. Froese. and Carlson. CR 571. ER 28. For appellate jurisdiction the pertinent portions of that order are:

> 5. The defendants are granted a new trial on all remaining claims [Hopkins. Froese and Carlson].
>
> 6. **THE DEFENDANTS' MOTION FOR A NEW TRIAL OR ALTERNATIVE RELIEF (Ct. Rec. 486) IS DENIED.** (Emphasis Added)" See CR 571. ER 28. CR 486. ER 26.

The ruling was clear. The new trial was ordered on the District Court's Rule 59(d) motion. not on General Electric's motions. The Court's order was predicated upon the Court's request for finding on sub-issues omitted from the special verdict form.

Pertinent to appellate jurisdiction is the interaction between Fed. R. Civ. P. 59(d) and 49(a). Both rules are jurisdictional. Stradley v. Cortez; and Gallick v. Baltimore & Ohio R. Co.. 372 U.S. 198. 110. 83 S.Ct. 659. 661. 9 L.Ed.2d 618 (1963). The District Court's authority to order a new trial on omitted sub-issues of damages was terminated when the parties agreed to a Special Verdict under Fed. R. Civ. P. 49(a). Accord

McCleod, supra. Under the limited authority of Fed. R. Civ. P. 59(d) the District Court did not have the authority to grant a new trial on issues disposed of by the special verdict. Burgess v. Premier Corp., 727 F.2d 826, 831 (9th Cir. 1984). A district court's authority to order a new trial sua sponte is limited by two jurisdictional requirements--time and potential scope of a district court initiated motion. Fed. R. Civ. P. 59(d).[6]

The district court may initiate its own motion within 10 days of a entered judgment. Fed. R. Civ. P. 59(d). Here, the District Court's motion was more than four months after the judgment. After missing the first ten days the District Court could only act when timely motions for a new trial have been made by a party. The Court's motion was untimely as to Hopkins and Froese.

Further limitations are that the District Court may enter a new trial only for a reason that a party might move. Fed. R. Civ. P. 59(d). General Electric could not have moved for a new trial for omitted sub-issues on damages, hence, the District Court lacked the authority to enter an order for a new trial on omitted sub-issues. Burgess, 727 F.2d at 831.

The parties agreed to a special verdict under Fed. R. Civ. P. 49(a). CR 467, ER 1-21. General Electric did not submit, object nor demand additional inquiries on injury and damages on the special verdict form.[7] Once, agreeing General Electric was bound to the special verdict findings as to Hopkins, Froese and Carlson. McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989). Rule 49(a) is clear that any issues omitted from the special verdict are waived. Burgess, at 831; also see Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th Cir. 1991). Under Fed. R. Civ. P. 49(a) a party waives the right to submit to another jury any issue

---

[6]For an extensive analysis to the relationship between Rule 59(d) and Rule 49(a) as they relate to the District Court's jurisdiction, see Appellant Carlson's Memorandum in Support of Remand for Lack of Jurisdiction and Reply Memorandum to General Electric's Opposition to Carlson's Motion to Remand herein. Those memorandums are adopted, incorporated, and relied upon herein by reference.

[7]Appellees-Defendants did not object, except or comment about the special verdict form actually submitted to the jury for any Appellant-Plaintiff. Appellees-Defendants counsel were present at the jury verdict. Appellees-Defendants never requested before the jury was dismissed that additional questions be submitted to the jury.

omitted from a special verdict form. Pau, 928 F.2d at 891-92.

The clear language and authorities endorsing Fed. R. Civ. P. 49(a) have consistently held this Rule, once accepted, limits the rights of the parties and of the District Court. Gallick, supra. 372 U.S. at 119 citing Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd., 369 U.S. 355, 364 82 S.Ct. 780, 7 L.Ed. 798 (1962). The District Court herein ordered what neither the court nor any of the parties had the right to do. Appellants' Carlson, Froese, and Hopkins challenge to jurisdiction are supported by the undisputed record and the controlling law.

L. Burden of Proof for Granting Summary Reversal and Affirmance of the District Court.

The Appellants-Plaintiffs and Appellee Guaragna have previously moved for a summary decision by this Court on the lack of jurisdiction for the District Court to amend or modify the July 13, 1994, judgments. Appellants-Plaintiffs now how objected and argued against General Electric's motion to dismiss for lack of jurisdiction their appeals. In responding General Electric may suggest Appellants-Plaintiffs positions are inconsistent such a suggestion would not be true. Appellants-Plaintiffs have consistently maintained the District Court did not have jurisdiction to dismiss five of the claims and order new trials on four of the claims. If Appellants-Plaintiffs application of the law to this record is correct, then resolution of the jurisdictional issues is dispositive of the entire matter.

Appellants-Plaintiffs and Appellee Guaragna all moved on jurisdictional basis for the matter to be summarily remanded to the District Court with instructions to enforce the July 13, 1994 judgments. A party who requests affirmance or summarily reversal has a heavy burden. United States v. Glover, 731 F.2d 41, 44 (D.C. Cir. 1984). Appellant-Plaintiffs and Appellee Guaragna must demonstrate that the merits of their claim are so clear as to justify expedited action. Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir. 1980). Appellants-Plaintiffs and Appellee Guaragna have met this burden.

The judgment of the jury on the special verdict came after three months of trial. The judgment was entered on July 13, 1994. The time requirements of Fed. R. Civ. P. 50 and 59 are jurisdictional. Budinich v. Becton Dickinson and Co., 486 U.S.

196, 203, 108 S.Ct. 1717, 100 L.Ed. 178 (1988). The District Court cannot consider untimely Fed. R. Civ. P. 50 and 59 motions. Browder v. Dept. of Corrections, 434 U.S. 257, 264-65, 267, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978).

On the merits of this appeal the District Court did not have the jurisdiction to amend or modify the July 13, 1994, judgment as to Schudels, Glass, Thompson, Froese, Hopkins or Guaragna. General Electric has failed to timely file an appeal as to any of those Plaintiffs by August 12, 1994. Given the record and the clear controlling law this Court's authority is limited to remanding this matter to the District Court with instructions to strike the November 25, 1994, and January 17, 1995, Orders. The only valid judgment existing as to Schudels, Glass, Thompson, Froese, Hopkins and Guaragna is the July 13, 1994, orders.

Under Rule 49(a) a special verdict form was used to resolve the dispute between Carlson and General Electric. General Electric neither submitted, objected, or requested an additional question on injury or damage to Mr. Carlson. General Electric removed from the District Court's jurisdiction all rights to submit omitted sub-issues of neurological or non-neurological damages. Fed. R. Civ. P. 49(a). Accord McCord, 873 F.2d at 1274.

Fed. R. Civ. P. 49(a) is clear and unambiguous--questions not submitted to the jury are waived by all the parties. Fed. R. Civ. P. 49(a). General Electric waived the right to another jury deciding the damages as to neurological and non-neurological conditions. Further, the District Court was prohibited from presuming the jury awarded damages for non-neurological conditions in Carlson. Gallick, supra. When General Electric lacked the right, the District Court could not acquire the right under Fed. R. Civ. P. 59(d).

The District Court made a factual finding to the omitted issue of neurological injury. The District Court found Carlson had a neurological injury as a result of General Electric's negligence. Under Fed. R. Civ. P. 49(a) the District Court had a duty "to reconcile the jury's findings, by exegesis if necessary, . . . before we [the judiciary] are free to disregard the jury's special verdict and remand the case for a new trial." Gallick v. Baltimore & Ohio R. Co. 372 U.S. at 108. The District Court failed to make another finding as to the damages arising from the

neurological injury found by it and presumably the jury. Fed. R. Civ. P. 49(a) controls this failure to find by the District Court.

Rule 49(a) is clear and unambiguous as to the disposition of the damage issue as to Appellant Carlson. When the District Court failed to make a finding as to the amount of damages from the neurological injury, "it shall be deemed to have been made a finding in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(a). According to the Rule and the controlling authorities of Gallick, and McCord the only finding that may ever be made is that Appellant Carlson suffered $2,775,768.00 in damages nothing more and nothing less. Any other decision was waived by General Electric on July 13, 1994, when the jury was dismissed. Most certainly, any question about the decision was waived on December 27, 1994 when General Electric failed to file an appeal from the District Court's findings whether stated or by operation of Fed. R. Civ. P.

On the merits the only resolution possible is that Appellant Carlson has suffered $2,775,768.00 in damages from the negligent conduct of General Electric. All other possible resolutions were subsumed in the voluntary agreement to be bound by a special verdict form. General Electric has waived the right to further decide the matter, hence the neither the District Court or this Court may alter the matter so decided on July 13, 1994.

IV. CONCLUSION

Under this record and the controlling authorities this Court has jurisdiction to decide the jurisdictional errors. Under the venerated authority of Phillips v. Negley this Court and the United States Supreme Court are the only Courts with jurisdiction to resolve this dispute as it now stands.

General Electric motion to dismiss was predicated on an incomplete and perhaps even inaccurate presentation of the record. When the record pertinent to jurisdiction is considered the application of the law cited by General Electric is straight forward. Even under General Electric's authorities of Browder v. Dept. Corrections, this Court has jurisdiction to remand all the appeals with instructions to the District Court to strike the November 25, 1994, and January 17, 1995 orders. Under the law cited by General Electric, the District Court lacked jurisdiction to amend or modify the July 13, 1994 order.

General Electric's motion to dismiss was maintained knowing: 1) it had waived the right to a jury trial under Fed. R. Civ. P. 49(a); 2) the District Court had found an injury had occurred to Carlson, Hopkins, Hopkins and Froese under Rule 49(a); 3) and the District Court's failure to make a contrary finding on damages could only now be found to be in accord with the special verdict findings. General Electric having failed to object, argue or in any way acknowledge its waiver under Rule 49(a) is bound to the special verdict findings and the one finding made post verdict by the District Court. General Electric was and is bound, so the District Court and this Court are bound by the special verdict of the jury.

Dated this 14th day of February 1995.

S/_____
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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On February 14th, 1995, I served the within **Appellants-Plaintiffs' and Appellee Guaragna's Responsive Memorandum in Opposition to Appellees' Motion to Dismiss** on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

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Executed this 14th day of February, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

Organic Solvent Encephalopathy: An Old Hazard Revisited

Peter Houck, M.D., Diane Nebel, BA, and Samuel Milham, Jr., M.D., MPH

This report describes neurologic and respiratory symptoms among 26 engineers and contract laborers who used organic solvents and detergents to remove polycholorinated biphenyl contamination from a poorly ventilated factory basement. Neurologic symptoms included persistent central nervous system deficits, these developed in on worker after only 3 days. Respiratory symptoms included cough that persisted for more than 2 years. Laborers were more likely to report symptoms than were engineers. Appropriate ventilation or respirator use might have prevented the workers' morbidity. This incident serves as a reminder that organic solvent-related occupational illness continues to occur despite worker-health regulations and knowledge of preventive measures.
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Key words: occupational illness, enclosed space, dibenzofurans, reactive airway dysfunction, solvent exposures.

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INTRODUCTION

Protecting workers against the effects of organic solvent exposure has been an occupational health priority because these compounds can cause neurologic damage [Morrow et al., 1990] and death [Browning, 1965]. Neurologic and respiratory symptoms developed among workers who used organic solvents and detergents in 1988 to remove polychlorinated bephenyl (PCB) contamination from a poorly ventilated basement. Protective measures were inadequate and not used consistently. We describe this incident as a reminder that easily preventable solvent-related occupational illness continues to occur in site of occupational health regulations and knowledge of protective measures.

BACKGROUND

In October 1988, a large multinational engineering corporation contacted to remove PCB contamination from part of a factory in Washington State. It provided a supervisory engineer and unionized engineers to work with unskilled, non-union laborers hired from another company. The supervisory engineer became ill 2 days after work began on October 15, was hospitalized, and did not return to the job. A series of engineers then directed the project.

The worksite consisted of five basement rooms with approximate volumes ranging from 187 to 210 m^3 that had been contaminated with PCBs from ruptured electrical capacitors. "Ventilation" was provided during the cleanup project by removing portions of the basement's ceiling; a nonvented fan was used intermittently to circulate air within the basement. Charcoal cartridge respirators were issued to the workers, although some reported receiving only paper dust masks.

Two organic solvent mixtures were used. One mixture contained alkylated benzenes (45%) and monoethanolamine (6%), and was applied as a foam. The other contained 1,1,1-trichloroethane (72%) and perchloroethylene (24%), and was applied as a spray. The vapors of both solvents are five times heavier than air, and will settle and accumulate in low-lying areas such as basements. Material safety data sheets (MSDS) provided with these products warned clearly that neurologic injury could

occur unless adequate ventilation or respirators were used, especially in low-lying areas. The two detergents used were applied as foam. Once contained sodium hydroxide; its MSDS recommended use of respirators if it was sprayed in enclosed areas.

On December 15, the day the PCB cleanup project ended, the supervisory engineer's illness was diagnosed serologiclly as legionellosis and was reported to the local health department and to the Washington State Department of Health Communicable Disease Epidemiology Office. This investigation was then undertaken because respiratory symptoms in other workers suggested a possible legionellosis outbreak.

SUBJECTS AND METHODS

Study Population

All 27 workers who were employed on the project were included in the investigation, although symptom and exposure data from the supervisory engineer are not included in this report because he worked for only 2 days before becoming ill. Of the other 26 workers, 14 (54%) were engineers and 12 (46%) were laborers; 21 (81%) were male. Their ages ranged from 20 to 61 years (median 43 years among engineers, 28 years among laborers). None of the laborers had previous experience with chemical cleanup, compared with 11 (79%) of the engineers. Project employment ranged from 3 to 58 days (median 24 days among engineers and 18 days among laborers).

Workers were questioned about symptoms and chemical exposure in person or by telephone between December 16, 1988, and February 28m 1989 and again in May 1989; later follow-up was through attending physicians. Factory officials provided data o their employee absenteeism.

Definitions

For this investigation, "persistent cough" was defined as self-reported cough that developed during the project and continued for more than 30 days after completion of work. "Memory change" was defined as self-reported memory impairment with onset during the project.

TABLE I. Prevalence of Symptoms in Laborers and Engineers, PCB Cleanup, Washington State, 1988

	Laborers (n = 12)		Engineers (n = 14)		Total (n = 26)	
Symptom	No.	%	No.	%	No.	%
Acute confusion	10	83	02	14	12	46
Headache	09	75	01	07	10	39
Memory change	04	33	01	07	05	19
Cough	12	100	07	50	19	73
Wheezing	08	67	02	14	10	39
Persistent cough	07	58	02	14	09	35

Laboratory Investigation

Sputa and sera were collected between December 17, 1988 and January 10, 1989 from a convenience sample of accessible symptomatic workers that exuded the original supervisory engineer. Microbiologic and serologic tests were done at the Washington State Public Health Laboratory. Sputa from 8 of the 19 workers with cough were tested for Legionellae by culture and direct fluorescent antibody staining. Unpaired sera from four of the workers with cough were tested for antibodies against Legionellae species, and from six workers with cough for antibodies against influenza virus, adenovirus, respiratory syncytial virus, and mycoplasma.

Sera from five of the workers with cough were tested for PCBs at the Washington State Pesticide Laboratory using gas-liquid chromatography with a detection threshold of 10 parts per billion (ppb). Sera from 12 workers (12 with cough, 10 with other symptoms) were tested for polychlorinated dizbenzo-p-dioxins (PCDD) and polychlorinated dibenzofurans (PCDF) at the Centers of Disease Control, Atlanta, using sequential gas chromatology/mass spectometry with a detection threshold of < 50 parts per trillion (ppt) [Patterson et al., 1987].

Four of the nine workers with persistent cough consulted an occupational medicine physician and were evaluated with mathacholine challenge tests. All five who reported memory change were evaluated by psychologists using batteries of quantitative neuropshychologic tests.

RESULTS

Clinical Findings

The frequencies of reported symptoms were: cough, 19 (73%); acute confusion while working, 12 (46%); wheezing, 10 (39%); headache, 10 (39%); persistent cough, 9 (35%); and memory change, 5 (19%). Laborers were more likely than engineers to report each of these symptoms (Table I).

The duration of "persistent" cough ranged from 31 days to 30 months (median 64 days) after job completion. One laborer was hospitalized with cough and dyspnea; all nine workers with persistent cough were treated with steroids of bronchodilator drugs. There was no increase in respiratory illness among factory employees of project workers' family members.

Individual chemical exposures could not be quantified reliably, because we did not learn of this incident until after completion of the project and also because detailed records of chemical use had not been kept. However, purchase records indicated that 55 gallons of organic solvent concentrated were used on the project; engineers estimated that 2-3 gallons were used in each shift when solvents were utilized. Solvents were not used simultaneously by all workers of in all parts of the worksite. Al least 50 gallons of detergent concentrate were used. Anecdotal reports from laborers indicated that the engineers spent less time in the basement using the cleaning agents than did the laborers.

Anecdotal complaints from both engineers and laborers indicate that work conditions were poor; ventilation was often inadequate, respirator use was minimal, skin protection was ineffective, and cleaning agents were reported to be mixed together and used in higher-than-recommended concentrations. One engineer reported that respirator use was sporadic and should have been mandatory; he left the basement frequently because of dizziness.

Laboratory Findings

No evidence of respiratory pathogen infection was detected in the sputa of sera of tested workers. No PCB's were detected in the tested sera. All sera tested for PCDDs or PCDFs contained the compounds , but at concentrations similar to those reported in the general population [Patterson et al., 1989].

Methacholine challenge tests were positive in three of four tested.

Neuropsychologic Test findings

Neuropsychologic test results were grossly abnormal in 2 of the 5 tested workers. The first, a 44-year-old laborer, developed headache, memory impairment, and acute confusion after 3 days of work, but did not lose consciousness. He used the solvent mixtures in an enclosed stairwell and denied receiving a charcoal cartridge respirator. His mental status had been clinically normal during a pre-employment physical examination performed 2 weeks before his solvent exposure, but was abnormal to the same examining physician after work on the project. The remainder of his neurologic evaluation, including computerized tomographic and magnetic resonance imaging scans of the head were normal. He had no history of neurologic illness, drug use, of previous organic solvent exposure. His condition is stable 3 years after exposure. He remains unable to hold his former job as a custodian and becomes list in his own neighborhood.

The second severely affected worker, a 24-year-old laborer, developed headaches, dizziness, and memory impairment after about 1 month of work, but never lost consciousness. His sister reported that his mental functioning changed in during the employment. He used all of the cleaning agent, but could not quantify his exposure. He denied receiving a charcoal cartridge respirator. Neuropsychologic testing performed 20 moths after job completion revealed deficits in attention, concentration, and memory. Three years after exposure he is unable to live independently and becomes lost in his rural hometown.

DISCUSSION

The neurologic symptoms experienced by these workers are consistent with those associated with organic solvents [Sandmeyer, 1981; Torleson and Rowe, 1981; Linz et al., 1986; Dick, 1988; Kruse et al., 1982; Morrow et al., 1990]. Although memory loss has been reported in persons exposed to PCBs, PCDDs, and PCDFs, a causal association has not be established [Proctor et al., 1988; Reggiani and Bruppach, 1985]. Most reports of solvent-related encephalopathy describe long-term exposure or ver high short-term exposure with loss of consciousness. It is relatively short periods of exposure without

loss of consciousness. Hypoxemia severe enough to cause permanent neurologic damage would result in unconsciousness [Adams and Victor, 1989]. Variable susceptibility to organic solvent neurotoxicity has not been demonstrated [Pelkonen, 1986].

Acute respiratory symptoms could have been caused by either of the organic solvent mixture [Sandmeyer, 1981; Deichman and Gerarde, 1969; Torkleson and Rowe, 1981], sodium hydroxide in one of the detergents [Proctor et al., 1988], or the detergents themselves [Kreiss et al., 1982]. The persistent cough may represent reactive airway dysfunction syndrome, a non-immunologic asthma-like condition that can follow acute exposure to a variety of respiratory irritants [Brook et al., 1985]. Although acute [Smith et al., 1982] and chronic [Warshaw wt al., 1979; Shigematsu et al., 1977] coughs have been reported with PCB and PCDF exposure, other studies have found no unusual respiratory symptoms among occupationally exposed person with serum PCB levels as high as 340 ppb [Chase et al., 1982, Maroni et al., 1981]. An infectious cause was not apparent; the supervisory engineer" legionellisis was probably acquired before the project began.

Adequate ventilation or consistent use of respirators probably would have prevented the workers' morbidity; both measures were clearly recommended in the MSDSs provided with the cleaning agents. What led to the particularly poor safety practices employed on this project is uncertain, although frequent changes of he symptoms was probably higher than that of the engineers because of more intense chemical exposure. Whether the laborers' lack of union membership contributed to particular unhealthy working conditions cannot be determined. Nonunion contribution workers have been reported to be generally less experienced, as in this incident, and to have poorer safety training and performance than union workers [Dedobbeleer et al., 1990], but another study found the relationship between unionization and workplace safety and health to be inconsistent [Taylor, 1987].

It is not possible to estimate how common incidents such as this one in Washington State, because there is no occupational illness reporting system similar to the communicable disease surveillance system that identified this problem fortuitously Experience in other states suggests that mandated reporting of occupational illness can identify remediable health hazards, even

though reporting ins incomplete [Centers for Disease Control, 1990].

CONCLUSIONS

The knowledge that organic solvents and other cleaning compounds can cause neurologic and respiratory problems is not new. However, the severe neurologic injuries suffered by workers in this incident are sobering reminders that easily preventable organic solvent-related occupational illness continues to occur in a highly developed country late in the twentieth century. Only the consistent application of recommended preventive measures will minimize the occurrence of incidents such as this.

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The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et. al., et ux.,	)	NO. 92-CS-0081-FVS
Plaintiffs,	)	
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	OFFER OF PROOF BY DR. DANIEL GOLDSTEIN
Defendants.	)	

STATE OF DENVER)
:ss
County of Denver)

Daniel Goldstein, being first duly sworn on oath, deposes and says:

1. I am a medical toxicologist. Attached as Exhibit A is a current copy of my curriculum vitae.

2. It is my understanding that the Defendants have challenged whether I am qualified to testify on the cause of Merlin Carlson's injuries from the 1988 exposure to chemicals at the PCB clean-up.

3. I have had my deposition taken over 3 days in connection with this litigation. In the first two depositions, I identified a significant amount of scientific literature as well as the

med-line research I performed on the solvents. See Exhibit B for the computer print out. I also identified the medical treatises I had in my office for consulting on the medical issues involved in the evaluation. In the third deposition, I again identified several binders filled with scientific articles on solvent exposure. See Exhibit C for the alphabetical according to author list of the above binders.

4. I also listed assorted text books that were available to me or available in my office including Hazardous Materials: Clinical Principles of Environment Health, ed. by John B. Sullivan, Williams and Wilkins, Baltimore (1992).

5. I also made reference to Dr. David Hartman's textbook, Neuropsychological Toxicology: Identification and Assessment of Human Neurotoxins, Pergamon Press, New York (1988).

6. Before my first deposition, Plaintiffs counsel attempted to provide Defense Counsel with a typed summary of my opinions. In the deposition I corrected where counsel had been in error in conveying my opinions. Exhibit D is a copy of that typed summary. In part the summary addresses some of the basics of the scientific literature.

7. In all three depositions neither Defense Counsel specifically asked what methodology I applied in arriving at my opinions. When given an opportunity to explain my opinions I attempted to do so.

8. I have an extensive background in toxicology, making me uniquely qualified to express opinions in this case. My background includes a Bachelor of Science in molecular biology. I have a Medical Degree from John Hopkins University. I have done a research and _____ fellowship in Clinical Pharmacology and toxicology. I have certification from the American Board of Pediatrics, American Board of Medical Toxicology and the American Board of Clinical Pharmacology. I have published in the areas of Pharmacology and Toxicology.

9. My practice includes Clinical Toxicology, Occupational and Environmental Toxicology, acute and chronic poisoning and Clinical Pharmacology. On a day-to-day basis I practice as a physician dealing with individuals that are exposed to neurotoxic substances including the chemicals present at the 1988 PCB cleanup at the Kaiser Mead plant.

10. Part of my practice involves advising employers on when and how they can provide protection to workers from toxic substances. I am familiar with many but not all government regulations as far as use of hazardous substances in work and in the environment. I am familiar with the scientific basis behind the regulations for protecting the worker and the environment.

11. I have reviewed extensive materials in connection with evaluating the injuries to Merlin Carlson and Dan Skeman. See as Exhibit B a list of materials that I have reviewed in connection with this.

12. Attached to this Offer of Proof as Exhibit E is a toxic exposure diagnostic strategy from Hazardous Materials Toxicology: Clinical Principles of Environmental Health, page 317. A brief study of the diagram will show that many different factors enter into evaluating whether a patient's problems are related to a toxic exposure.

13. I understand Defense Counsel have made broad statements as to the scientific basis of opinions about the etiology of Merlin Carlson's injury. For example I understand Defense Counsel has written:

> First, the literature validates only two scenarios from which an encephalopathy may result from exposure to certain solvents: (1) when an individual sustains chronic exposure to the solvent over a decade or more years; or (2) when an individual sustains a severe acute exposure to a very high level of solvent, and suffers an accompanying loss of consciousness. . . . Goldstein dep. tr. (9/2/93) at 129, 148-150 (agreeing that most reports of solvent-induced encephalopathy follow these two patterns); see generally Spencer and Schamberg, "Organic Solvant Neurotoxicity," 11 Scand J. Work. Environ. Helath 53 (1995) (review of solvent neurotoxicity evidence). See Defendants Memorandum of Points & Authorities in Support of Joint Motion In Limine On Encephalopathy Claims page 24.

Defense Counsel has taken my deposition testimony out of context. Defense counsel has also identified some journal publications, which I shall address.

14. Attached as Exhibit F are pages 129-134 of the 9-2-93 Deposition. The answer in context does not stand for what Defense Counsel is asserting in their Brief.

15. Below I shall address in more detail the scientific literature as to the etiology of Merlin Carlson's injury.

16. I have seen that Defense Counsel is citing Drs. Spencer & Schumberg, "Organic Solvent Neurotoxicity: Facts and Research Needs. Scand. J. Work. Environ. Health, 11.supp.1:53-60 (1985) as authoritative on toxic encephalopathy. From a scientific standpoint such a conclusion is in part misleading. First, the article is directed towards what research is needed in connection with solvent exposures. Drs. Spencer & Schumberg were urging doctors to use a logical scientific method in reporting incidents of solvent induced encephalopathies. Second, the article is not a review of all the scientific literature available on solvent induced encephalopathies. Drs. Spencer & Schumberg recognized "This brief survey demonstrates that certain aliphatic and aromatic solvents are proved neurotoxicants in humans and animals. . . . Many other solvents and solvent mixtures are suspect human neurotoxicants and, remarkably, the majority of solvents in daily use has yet to be tested for chronic neurological effects in experimental animals." Id. 58-59. Drs. Spencer and Schumberg conclude their call for research with the following:

> The degree of reversibility depends principally on the type and extent of neurological damage: peripheral nerves generally regenerate, whereas lesions of the brain and special sense organs are more often associated with permanent deficits. Taken together, these principles should be useful to identify other solvents with neurotoxic potential so the future human exposure to harmful concentrations may be prevented." Id. 59.

17. Drs. Spencer & Schumberg call for more research was published in 1985. There has been considerable scientific research published as to solvent exposure and neurotoxic injuries over the last 9 years.

18. In an every day medical practice a competent physician does not await for a scientific article to be published

regarding the patient's present condition to be published before he or she determines the probable etiology of a patients condition. Rather, a physician uses a patient's history, physical examination, tests and what-ever scientific literature might be available to arrive at a diagnosis of patient and determine etiology. With neurotoxic insults this methodology is supported by the scientific authors relied upon by Defense Counsel. Drs. Schaumburg and Spencer have an article entitled "Recognizing neurotoxic disease" Neurology Vol. 37: 276-278 (1987). These doctors note:

> **The investigation of suspected neurotoxic disease.** A focused history is the cornerstone of the neurotoxicology clinical evaluation. The history alone often establishes or strongly suggests a diagnosis of toxic disease.

The history available on Merlin Carlson and the workers at the 1988 PCB clean-up is consistent with a neurotoxic insult.

19. Drs. Schaumburg and Spencer also point out other factors in recognizing neurotoxic disease. Those factors include: 1) Neurotoxic chemicals associated with nervous system degeneration rarely destroy focal areas of the CNS or PNS. i.e. the damage is more global; 2) Exposure to different levels of the same substance may result in a dramatically different clinical picture; 3) Neurotoxic illness usually occurs concurrent with exposure or following a short latency; 4) An agent without known neurotoxic activity may enhance the toxicity of a known neurotoxin that is present at a "no-effect" level; and 5) "Asymptotic toxic disease of the nervous system occurs and, under certain circumstances, may be widespread. Unless a consistent, high-level intellectual activity, a modest decline in performance may go unnoticed. An analogous phenomenon has been described in workers with subclinical toxic neuropathies who deny an disability despite sensory dysfunction obvious to their spouses."

20. I have utilized a recognized scientific processes in analyzing the information provided to me. A systematic approach in evaluating toxic causation would include:

a. Defining the exposure;
b. Evaluating the exposure dose response relationship;
c. Evaluating the temporal relationship;
d. Evaluating latency periods;

e. Evaluating known association of disease by chemical;
f. Evaluation of the pathophysiology; and
g. Considering confounding factors and risk modification factors.

21. Many of the medical treatise on toxicology have sections devoted to the scientific analysis of exposure to toxic substances. For example the above method for analyzing the etiology of a potential toxic exposure is one scientific recognized method. See Hazardous Materials Toxicology: Clinical Principles of Environmental Health.

22. In routine toxicologist practice, patients are frequently referred to neuropsycholgist for evaluation. It is part of a toxicologist's methodology in working up a patient to refer to a neuropsychologist for testing. The toxicologist and neuropsychologist and perhaps other health care professionals collaborate in diagnosing a patient's condition.

23. In deposition I identified Dr. Larry W. Welch's "Chronic neuropsychological and neurological impairment following acute exposure to a solvent mixture to toluene and methyl ethyl ketone (MEK)", Clinical Toxicology, 29(4): 435-445 (1991). See Exhibit G. A worker was exposed to solvents in an unventilated room on only two separate occasions. He had with exposure he had symptoms of dizziness and headaches, but did not lose consciousness. He began to note concentration and memory difficulties. His wife provided history that the worker lost the ability to carry out daily activities containing sequential steps. He had continued complaints of headaches, respiratory distress, feeling "weak and tired", shortness of breath, appetite and sleep disturbances and loss of libido. From this history neuropsychological and neurological test were performed. The testing documented impairment. After analyzing the history and testing it was determined that the worker had brain damage from an acute exposure to solvents.

24. I have attached Exhibit G, which is Dr. Welsh's paper is not only illustrative of "solvent" induced encephalopathy, but also of the methodology used by physicians in determining the etiology of a disease.

25. In reviewing the materials it is my understanding that the following cleaning products were used at the 1988 PCB cleanup: Capsur (R), HDD Heavy Duty Degreaser, alkaline

cleaner (HDD), power cleaner, Seaport, CRC heavy duty cleaner,

26. I also was provided portions of deposition testimony, in which workers were describing how these chemicals were being used. The depositions also described the symptoms the workers were manifesting at the time of using these chemicals. Since my deposition I have also been provided the 16 page report of Dale Haskin's. A sopy of Dale Haskin's report will be attached as Exhibit H.

27. I have reviewed the Material Safety Data Sheets (MSDS) from the above chemical agent. There are several known neurotoxic agents present in the chemicals. They include, 1,1,1 trichloroethane, (methyl chloroform), perchloroethylene (tetrachloroethylene), aromatic hydrocarbon mixtures including naphthalene and 1,2,4 trimethylbenzene, ethylene glycol, monethanolamine.

28. I have reviewed the Offers of Proof as to Dr. Cripe and Dr. Beaty. I am in agreement in their analysis and description of the scientific literature.

29. In inquiring of me, defense counsel made reference to the fact that there was no trichlorethylene originally contained in the cleaning products. However, that does not mean that all of the scientific literature on trichloroethylene may be ignored. 1,1,1 Tricholoroethane, perchloroethane and trichlorocthylene are all chlorinated hydocarbons. The scientific literature documents that the neurotoxic effects of these chlorinated hydorcarbons is similar. With some chlorinated hydrocarbons there maybe further unique biological effects. Trichloroethylene can be created by mixing an weak acid with perchloroethane.

30. From the information provided there is no question Merlin Carlson was exposed to neurotoxic chemicals. Merlin Carlson's complaints at the time of the exposure and after the exposure are consistent with a toxic dose of these chemicals. Further the complaints of the other workers at the time of exposure are corroborative of an exposure to toxic chemicals.

31. In item 1 of Exhibit I, organic solvents are defined. At page 420 of item 1 in Exhibit I, it states:

> Hydrocarbons are derivatives of petroleum distillation, the major class of which includes straight chain saturated and unsaturated aliphatics, cyclic,

> and halogenated hydrocarbons....There are five major clinical syndromes caused by exposure to hydrocarbon products: skin toxicity, gastrointestinal toxicity, pulmonary toxicity, central nervous system toxicity, and generalized systemic toxicity. Acute or chronic exposure to hydrocarbons can result in significant skin injury. Hydrocarbons are directly irritant to the epidermal tissue and as a consequence of their high lipid solubility may cause dissolution of fatty tissues and penetration of cell membranes.

32. In lay terms "lipid" is referring to fat. The nerves and brain tissue have a significant amount of fat cells associated with the tissue.

33. I have reviewed and considered the peer reviewed the article "Organic Solvent Encephalopathy: An Old Hazard Revisited", Houck, P., Nebel, D., and Milham, S. American Journal of Industrial Medicine, 22:109-115 (1992). This article documents neurotoxic exposure of Merlin Carlson and the other workers at the 1988 PCB clean-up. This article was published in a peer review journal, indicating that it is of acceptable scientific quality as to its' data and conclusions.

34. I have also reviewed the underlying data collected by Spokane County Health Department and the Washington State Health Department. The information collected by the Health Departments is the type of information a toxicologist would consider in evaluating a patient. The initial information collected by Ms. Nebel is impressive, since the workers did not know about the connection between their symptoms and toxic encephalopathy. The article is additional scientific research documenting solvent exposures causing encephalopathies.

35. In Houck's article a question is posed as follows:

> Most reports of solvent-related encephalopathy describe long-term exposure or very high short-term exposure with loss of consciousness. It is uncertain why persistent neurological deficits developed in two workers following relatively short periods of exposure without loss of consciousness.

Apparently, at the time this article was published Dr. Houck did not know about the reports from fellow workers about Dan Skeman's and Merlin Carlson's loss of consciousness.

36. Drs. Spencer and Schumberg identified in "Recognizing Neurotoxic Disease", "Acute intoxications associated with altered sensorium or cognitive state pose a formidable challenge because a history may be unobtainable." see page 277. A person, who has come under the intoxication of chlorinated hydrocarbons, may not realize he has had a change in a level of consciousness or much less a loss of consciousness. It maybe that the exposed worker does not realize or remember what has happened to him or her. The workers questioned by the health department may just not have remembered or realized there was a change in their level of consciousness. Fortunately, other workers were able to provide other aspects of the occupational history of the 1988 PCB clean-up. In a routine medical practice toxicologist do rely on occupational history received from co-workers. From the information made available to me both Mr. Skeman and Mr. Carlson have documented losses of consciousness.

37. The Spokane County Health Department and Washington State Health information on the exposure symptoms of the workers is supportive of Merlin Carlson's injury. The main symptoms reported were respiratory, dermatitis and central nervous system disorders. See Diane Nebel's report.

38. The pertinent individual symptoms listed for group of workers were as follows: Headaches - 67%, Cough - 83%, Productive Cough - 54%, Diarrhea - 29%, Chest Pain - 38%, Rash - 58%, Abd. Pain - 38%, Muscle Pain - 8%, Vomit - 21%, Nausea - 50%, Memory Loss - 13%, Confusion - 8%, Dizzy - 21%, Faint - 13%.

39. Merlin Carlson was interviewed by Diane Nebel in December 1988. In Diane Nebel's investigative records indicate Merlin Carlson had the following pertinent symptoms: Headache, Dry Cough, Light Headed, Dizzy, Disoriented, Rash, and Breathing Problems when working.

40. 1,1,1 trichloroethane is a chlorinated hyrdrocarbon. Trichloroethylene is a chlorinated hydrocarbon. Perchloro-ethylene is chlorinated hydrocarbon. Chlorinated hydrocarbons are also referred to as halogenated solvents. All of these chemicals are in the same family are physically and chemically

similar. They affect the central nervous system similarly. That is "all of the halogenated solvents are central nervous system depressants that produce dose-related changes in metal function and consciousness depending on the individual chemical and the duration of exposure". Hazardous Material Toxicology: Clinical Principles of Environmental Health page 736. Further, "central nervous system depression develops following exposure to high doses of all of the halogenated solvents, and most initial deaths result from respiratory depression and subsequent hypoxia." Id p. 739. Acute systemic toxicity to halogenated solvents present clinically as:

> "All the halogenated solvents are classic CNS depressants that may produce some initial excitation followed by depression of the central nervous system. The type and onset of symptoms depends on the duration of exposure, concentration, previous exposure history, minute ventilation, and individual susceptibility. Following inhalation of high doses of these chemicals, the rapid onset of central nervous system depressions may occur manifest by dizziness, ataxia, headache, fatigue, lethargy, nausea, and abdominal pain that progresses to stupor, apnea, coma, and death." Id. 741

41. The basic central nervous system toxicities of these chemicals are essentially interchangeable. Attached as Exhibit ___ is table 64.2 from Hazardous Materials Toxicology: Clinical Principles of Environmental Health, which list the threshold levels for these chemicals. Id. p. 736 The chemicals only vary as to degree of toxicity as to their particular dosages. On top of their general toxicity, certain of these chemicals may have individual toxicities. For example trichloroethylene can cause trigeminal nerve complications. (The trigeminal nerve is in the face.)

42. The MSDS's of the cleaning products used at the 1988 PCB cleanup indicate that there was 1,1,1 trichloroethane (methyl chloroform) and perchloroethylene (tetrachloroethylene) present

43. Attached to this Offer of Proof are photocopies of table 6.4 from Hazardous Material Toxicology: Clinical Principles

of Environmental Health. I have highlighted for the Court the chemicals involved here. This is done for the Court's benefit as to identifying basic information such as the chemicals' various names, their NIOSH numbers, their molecular weight and their structural formula.

44. Chlorinated hydrocarbons, halogenatic solvents, are also known as organic solvents.

45. Most of the halogenatic solvents were discovered in the 1800's and were initially investigated as anesthetic agents. Over the years many of the halogenatic solvents fell out of use as far as anesthetic agents because of their hepatotoxic properties.

46. The breaking down of these chemicals when exposed to heat, light and other chemicals is important. For example, the addition of weak acids to tetrachloroethane (perchloroethylene) produces trichloroethylene.

47. There is extensive literature on trichloroethylene producing neurotoxic injuries to workers.

48. In evaluating Merlin Carlson's injuries, I have taken into account his past medical history including his prematurity, his school records and his work history. It is my opinion on a more probably than not basis that the aromatic hydrocarbons, the chlorinated hydrocarbons, and the other chemicals used in the 1988 PCB cleanup injured Merlin Carlson.

49. The pulmonary route is the main source of toxic exposure to halogenatic solvents. Chemicals such as 1,1,1 tricholorethane, perchloroethylene and any by products such a trichloroethylene and well absorbed through both the lungs and gastrointestinal tract. The speed of absorption depends upon the transfer of the chemical through the pulmonary capillaries into the blood and the concentration of the chemical in the blood.

50. Given the fact that Merlin Carlson was found "passed out" at one point more probably than not he had reached a peak level of exposure to one of these chlorinated hydrocarbons. Since chlorinated hydrocarbons are central nervous system depressants, reports of loss of consciousness indicates there were high levels of chlorinated hydrocarbons present. More probably than not Merlin Carlson was exposed to ranges of tetrachloroethane, 1,1,1 trichloroethane and the by product trichloroethylene in amounts greater than the threshold value limits.

51. More probably than not the impairments and

behavior changes noted by Drs. Beaty and Cripe were caused by Merlin Carlson's unprotected exposure to the solvents and other chemicals used at the 1988 PCB cleanup.

55. Tetrachlorethane has a prolonged elimination time. Neurological signs and symptoms following tetrachloroethylene may be delayed several hours and may last for several days. The signs and symptoms of tetrachloroethylene also include mental confusion, disorientation, poor concentration, dysarathria, ataxia, amnesia, dysphasia and numbness. Exposure to tetrachloroethylene and the potential by product, trichloroethylene has been associated with central nervous system including headaches, irritability, emotionality, personality change, fatigue and anxiety. There have been individual case reports associated with the development of peripheral neuropathies with work place exposure to 1,1,1-trichloroethane. See Liss, G.M. "Peripheral Neuropathies In Two Workers Exposed To 1,1,1-Trichloroethane," Journal of the American Medical Association, 260 2217 (1988).

53. I have considered all of Merlin Carlson's medical history as well as his exposure history at the 1988 PCB clean-up. I have specifically considered the issue of Merlin Carlson's prematurity. It is my professional opinion that the impairments noted by Drs. Beaty, Cripe, and Lantsberger were more probably than not caused by the unprotected exposure to the chlorinated hydrocarbons, solvents, aromatic hydrocarbons, and other chemicals present at the 1988 PCB clean-up.

54. My professional opinions are based upon the information above, the material I reviewed in connection to Merlin Carlson, Dan Skeman, and was listed in three depositions taken of me, as well as my education, experience, knowledge, and background.

s/_____
Daniel M. Goldstein, M.D.

SUBSCRIBED AND SWORN to before me this 13th day of January, 1994.

s/Melody M. Winter
NOTARY PUBLIC in and for the State of Colorado residing in Denver.
Commission Expires: 5/17/97

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The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et. al., et ux.,	)	NO. 92-CS-0081-FVS
Plaintiffs,	)	
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation, and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	DECLARATION OF SAMUEL MILHAM, JR. ON OFFER OF PROOF
Defendants	)	

Samuel Milham, Jr., M.D. declares and states:

1. I am a physician licensed by the State of Washington. I am an epidemiologist. A copy of my Curriculum Vitae is attached as Exhibit A.

2. I have numerous degrees and experience in the area of science, including a background in chemistry.

3. I received my first medical degree in 1958. I have a Masters of Public Health Degree from John Hopkins School of Hygiene and Public Health 1961. I have extensive post-graduate study in epidemiology. In 1966 I became an diplomate of the American Board of Preventive Medicine.

4. I have worked and taught in the area of chronic disease epidemiology for the last 32 years.

5. I have worked for the State of Washington Health Department in various capacities in the epidemiological section.

6. I have special interest and experience in the area of occupational and environmental epidemiology.

7. I have published over 65 articles in various peer review journals primarily in the area of epidemiology and occupational health.

8. I have worked extensively with the industrial community of the State of Washington in occupational health.

9. For over ten years I have conducted a mortality monitoring at the Kaiser plants in Spokane. A mortality monitoring study is a type of epidemiological investigation. This area of my investigative experience was discussed in the deposition. I am familiar with occupationally caused diseases and injuries in Spokane, Washington.

10. In my various professional capacities for the State of Washington, I have conducted Health Hazards Evaluations and epidemiological studies with and for most the major industrial employers in the State of Washington, i.e., Boeing, Kaiser and Weyerhaeuser. I am familiar with and have had experience with workers who have been exposed to organic solvents. I have professional experience in investigating the health implications of workers exposed to organic solvents. I am familiar with the chemicals used in the 1988 clean-up at the Kaiser plant.

11. I am familiar with state and federal regulations that were and are designed to protect workers from injuries from exposure to hazardous chemicals.

12. I am familiar with and have conducted numerous of epidemiological investigations of occupational caused diseases.

13. I am familiar with and have conducted numerous of investigations, where there is a question of toxic injury to workers.

B. GENERAL METHODOLOGY OF EPIDEMIOLOGY

14. I have been advised by plaintiff's counsel that the court needs to review the methodology that I applied to the investigation of the 1988 PCB cleanup at the Kaiser-Trentwood Plant in Spokane, Washington. Further, I have been advised that the court is questioning the methodology that was applied to the peer review article which was is entitled: "Hazardous Solvent Encephalopathy: An Old Hazard Revisited" by Peter Houck, M.D., Diane Nebel, B.A., and Samuel Milham, Jr., M.D., MPH, American Journal of Industrial Medicine, Vol. 22, 109-115

(1992).
A copy of the article is attached as Exhibit B to this Declaration.

15. In general terms Plaintiff's counsel has explained to me the law of a case Daubert v. Merrell Dow. From my understanding of the law, the Court is askING for the same creditability scientists ask from one another in scientific research and publications.

16. The question of whether my opinions are logical scientific conclusions have previously been addressed by my peers. The Health Hazard Evaluation that we performed at Kaiser was a state of the art investigation. We followed the format used by NIOSH. The results of our investigation were scrutinized by the editorial board of the American Journal of Industrial Medicine. They found our scientific methodology to be sound. They published our article. The health effects of these chemicals has previously been scientifically established. I point the Court to the Material Safety Data Sheets (MSDS's). The MSDS's on the chemicals are as a result of previous investigations, studies and scientific documentation of the effect of the individual chemicals on persons.

17. In conducting the Health Hazard Evaluation in 1988 we used a standard medical process known as a differential diagnosis. The Health Hazard Evaluation was originally conducted because there was a reported case of Legionella. We ruled out Legionella infection. We ruled out PCB's as being the cause of the workers' complaints. The only other agents left were the solvents and detergents used in the clean up. The solvents and detergents used in the clean up are scientifically known and documented as causing the type of conditions that some of the workers had. I shall now discuss my methodology in more detail for the Court.

18. I am familiar with a court's need to know the methodology that I have applied. In my work for the State of Washington the methodology applied to my investigation has been reviewed and presented to a variety of tribunals as well as legislative committees.

19. To concisely present this information, I have referred Mr. Dawson to the textbook, Primer of Epidemiology, by Dr. Gary D. Freedman, McGraw-Hill Book Co., New York 1974. This is a basic textbook, which would be used by a medical

student or a medical practitioner. I use this textbook to teach students.

20. I have suggested that counsel purchase this book, so the book can be made available to the court in the event there is a question about my offer of proof and the authority for my statements.

21. Epidemiology is a well-established area of medical science. The methods used in epidemiological studies have been extensively researched and validated. Basic epidemiological methods are taught to every medical student in the United States.

22. Epidemiology is fundamental to medical science. However, epidemiology is different from the clinical practice of medicine. Epidemiology involves groups of people, where clinical medicine involves individual patients. In epidemiology the individual patients are scientifically investigated. Then the entire group of patients and the results of the investigation are studied.

23. Epidemiology is intimately involved in the clinical practice of medicine. Treating physicians regularly use epidemiological knowledge in the diagnosis and treatment of diseases in patients. For example, epidemiology investigations are conducted as drug trials and to evaluated various medical treatments. Another example is the body of medical knowledge concerning AIDS. Epidemiological studies were conducted to determine who had the syndrome and what habits were associated with development of the syndrome. From the epidemiological studies other medical scientists began looking for an infectious agent as the cause of AIDS. Without epidemiological studies medical science would be in the dark ages.

24. An epidemiological investigation is based upon the observation of natural differences in exposures on the outcomes among subjects. From the questions that were asked of me in the deposition, there may be some confusion between an epidemiological investigation, such as Health Hazards Evaluations, and experimental studies.

25. In a true experimental design the treatment or exposure is entirely under the control of the investigator. In contrast epidemiological studies do not control the exposure or treatment, but instead control the selection of study subjects and the method of analysis.

26. An epidemiological investigation plays an important

role in the science of medicine in determing the cause of toxic disease. For it is simply not feasible, or necessarily ethical, to consider conducting experiments on humans to learn the cause and effect relationship between toxic chemicals and exposure.

27. The Health Hazard Evaluation done on the 1988 PCB clean up was routine. Usually Health Hazard Evaluations are done when workers contact NIOSH or state health departments about contamination or exposure to toxic chemicals. Then a Health Hazard Evaluation is performed. Here the only difference is that the health department was contacted to perform a Health Hazard Evaluation of a potential Legionella out break. In investigating we found that there was not an out break of Legionella in this group of workers. The Health Hazard investigation was modified to address what the source was of the workers' complaints. It is not unusual for the investigators to consider other sources of hazards than the source originally suggested.

29. Studies of exposures to toxic hazards can be classified in three different categories: 1) descriptive, 2) etiological or analytical, and 3) interventional.

30. Descriptive studies record the occurrence of illness or effect in individuals under different exposures. These types of studies are frequently used in regard to the cause and effect relationship between hazards and exposures. Descriptive studies are used for identifying risk factors; identifying trends; identification of the theory of the cause and effect relationship of exposure; and for determining background levels of chemicals.

31. Etiological or analytical studies are an attempt to establish a causal relationship between hazards and disease or toxic conditions. These types of studies provide a temporal ordering of cause and effect control of confounding factors and identify consistency with the plausible mechanistic theories. These types of studies also denominate dose-effect relationship.

32. Intervention studies are used to support a cause and effect inference. They are used to establish successful programs designed to control toxic hazards.

33. If one wanted to do some specific reading on epidemiology, biostatistics and toxicology, I would refer you to an Introduction to Epidemiological Methods by Kahn, H.A., Lilienfeld A.N., Editor, Monographs in Epidemiology and

Biostatistics. New York: Oxford University Press (1983). Modern Epidemiology by Rothman K.G., Little Brown, Boston, 1986 and Statistics for Toxicology, Salisburg, D.S., Bekker New York 1986, and Chapter 6 by Steve Piantotadosi, M.D., Ph.D., Epidemiology and Principles of Surveillance Regarding Toxic Hazards in the Environment from Hazardous Materials Toxicology: Clinical Principles of Environmental Health, Editors, John B. Sulivan, Jr., and Gray R. Krieger, Williams & Wilkins, Baltimore, 1992.

34. Research scientists, toxicologists, occupational medicine specialists and research epidemiologists attempt to estimate the increased risk that exposures to toxic substances pose to persons.

35. Epidemiological studies have provided medical science with a large body of knowledge as to the etiology of most diseases. In determining the cause of disease, epidemiologists have developed different scientific methods for analyzing relationships. One view of causation of disease, particularly infectious disease, is in tripartite term. The terms are 1) the agent, 2) the environment and 3) the host.

36. For example, in the 1988 PCB clean up, the hosts were the laborers and engineers. The environment included the Kaiser Trentwood Plant and what was in that environment. In the beginning the Health Hazard Investigation hypothesized the agent was Legionella. This was ruled out by laboratory tests. In the Health Hazard Investigation, it was apparent a group of the host had a common illness. We then began looking for other logical agents. An obvious agent was PCB. The PCB's were ruled out by exam and laboratory tests. The remaining agents were the solvents and detergents used in the clean up. We then gathered information on the health implications of the chemicals used. The data confirmed the chemicals used caused the illnesses the workers had. We then looked again at the host. We conducted 1) additional interviews; 2) reviewed all the medical and hospital records; 3) discussed the patients with the clinical physicians; and 4) had objective tests such as neuropsychological exams and methacholine challenge performed. Then we analyzed all our information again. See Exhibit B for a summary of the scientific analysis.

37. A second method of investigating the cause of the

disease is known as the "web of causation." The concept of "web of causation" is important in analyzing exposures to toxins.

38. In Dr. Freidman's, Primer On Epidemiology, there is a schematic drawing on the "web of causation" of myocardial infarction, heart attacks. This diagram has been attached as Exhibit C to this Declaration. In explaining a "web of causation" analysis it is important to consider that the development of a disease condition may be multi-factorial. In analyzing an incidence of toxic exposure an epidemiological investigation develops a similar "web of causation." The "web of causation" for toxic chemicals would consider some of the same factors as Exhibit C. In addition with toxic chemicals epidemiological studies also consider the chemicals at the site, exposure to other chemicals, the work conditions, personal protective equipment, and other known factors associated with the toxins.

39. Epidemiology may use both qualitative and quantitative measures. In epidemiology quantities are measured and descriptive terms are used to describe the groups of persons.

40. In considering basic measures of epidemiology there are counts, proportions and rates, prevalence rates, incidence rates and other rates such as mortality rates, morbidity rates and case fatalities.

41. In considering the counts, proportions and rates of disease, the epidemiologist is addressing qualitatively and quanatively the differences between groups of people.

42. Prevalence is a measure of existing cases in a defined population at sometime. Prevalence = number of existing cases divided by size of the population.

43. Incidence is a measure of new cases that arise in a population during a defined time interval. Incidence rates = number of new cases divided by population at risk by time interval.

44. Epidemiologists attempt to estimate the increased risk that an exposure to a toxic substance in the environment posses to an individual. A useful measure for this increased risk is known as relative risk. Relative risk = risk in exposed subject divided by risk of unexposed subject.

45. Assessing the risk of a chemical is a complex process. Attached as Exhibit D to this Declaration is a schematic drawing from Hazardous Material Toxicology: Clinical Principles

of Environment Health which identifies a risk assessment summary. This is put out by the U.S. EPA.

46. In working for the Health Department as an epidemiologist, I was involved in the identification and prevention of occupational diseases. The state had an interest in reducing the risk to Washington workers. Epidemiological studies are one method of identifying the potential risk.

47. As I mentioned above, it is frequently dangerous with toxic chemicals to conduct experimental studies. In investigating the risk of toxic injury the scientific method frequently used was an observational study. However this does not mean an Epidemiologist ignores previously performed experimental studies. An epidemiologist may consider the result of experimental studies in designing and analyzing the results of an epidemiological study. In designing an observational study an epidemiologist may also consider information that has been identified in environmental surveillance's.

48. In an observational epidemiological study one is describing the occurrence of the disease population.

49. Descriptive studies usually involve the determination of incidence, prevalence and morbidity rates for disease in population groups according to basic group characteristics. Group characteristics may include age, sex, race, work environment, and exposure to chemicals. Descriptive studies are used frequently in the epidemiology of chemical exposures in humans.

50. There are also prevalence or cross sectional studies. Prevalence or cross sectional studies examine the relationship between disease and other characteristics or variables of interest as they exist in the defined population at one particular time. The principles of prevalence and cross sectional studies are applicable to the present case. There are variables noted between the exposures of the laborers versus the engineers. In comparing the laborers to the engineers there were differences in the severity of exposure to chemicals and concomitant differences in the prevalence of symptoms.

51. The work for the State Health Department often involves descriptive study. This is because descriptive epidemiological studies reveal the pattern of disease occurrences in human populations. A descriptive epidemiological study

provides general observations concerning the relationship of the disease to basic characteristics. Basic characteristics include personal items such as age, sex, race, occupational, geographical location, time of occurrence of disease, and clinical presentation. The areas of descriptive epidemiology may be summarized under the categories of person, place and time.

52. In the present case, it is important to consider the factors of occupation, time of occurrence of disease and place.

53. Place is a matter of great importance. Place provides obvious clues to the etiology of a disease and serves as a reference point for investigation.

54. In the context of the Health Department, follow-up investigation is important. The Health Department may be working with the attending physician in considering what further clinical testing needs to be done of a particular person.

55. In this case we conducted an epidemiological Health Hazard Evaluation. The treating physicians have conducted clinical evaluation of the individual patients. While questions of disease etiology may be answered by studying population groups, clinical problems often require study of groups of patients. For example the efficacy of treatment can only be defined by studying groups of patients.

56. In epidemiology, the physician is concerned about error rates in collecting information. Since epidemiological information is foundational to medical science, the reliability of data and conclusion is of paramount concern. As such there are specific methods utilized by standard epidemiological studies to control for errors.

57. In making observations or measuring there is some degree of error. Accepting the fact that there is the potential for error, epidemiologists take error factors into account in interpreting their data.

58. In epidemiology error effects two important aspects of data quality, that is validity and reliability. Validity or accuracy is a measure of how closely the observations correspond to the actual state of affairs. Reliability or reproducibility is a measure of how closely a series of observations of match similar events or conditions. These two areas of potential error are considered in gathering data for Health Hazard Evaluation.

59. In the Health Hazard Investigation of the 1988 clean

up we controlled for errors. The following activities were done to control for errors. Identical questions were asked of everyone. We went back and did a second questioning. Doing second interviews are an example of replication. Replication is one method of controlling for error. We referred the workers to clinical physicians to corroborate what was being said and what we observed. We had additional objective tests done such as neuropsychological testing and methecholine challenge testing. We used the basic differential diagnosis process to direct our investigation. As I outlined above we first looked for Legionella's and ruled that out. We look for the possibility of PCB poisoning and ruled that out. We then looked to the other agents present in the environment of the laborers and the engineers.

60. Exhibit E is another schematic from Hazardous Material Toxicology: Clinical Principles of Environmental Health addressing elements of an evaluation. This schematic identifies some of the variables associated with chemical exposure. The source of this also is from the U.S. EPA. An epidemiological investigation of a chemical exposure would take such variables into account.

61. When the exposure is to toxic chemicals, there needs to be an investigation of what chemicals were at the site, what the air sources were, what the sources of contamination were. Additionally, there may need to be information collected on the clinical symptoms including: having 1) blood work drawn, 2) respiratory assessments, 3)neurological assessments, 4) neuropsychological assessments and 5) other clinical assessments recommended by treating physicians.

62. After this information is collected, assessed and evaluated, then scientific analytical principles are applied to all the available information.

63. In an epidemiological investigation the epidemiologist may be involved in the initial investigation by collecting basic data. Then the follow-up clinical data gathering is carried out by the treating physicians. In part this is done because follow up test may have risk associated with them. Further when a person is injured treatment is needed. A treating physician is in a better position to direct the care and interpret the responses to treatment. The epidemiologist takes the data collected by the treating physician and compiles it with the initially collected data.

C. Epidemiological Investigation.

64. A supervising engineer became ill the second day of the 1988 clean up. In the hospital he was tested for infections. It was reported he had Legionellosis. This is a reportable disease.

65. It was reported to the local health department and the Washington State Department of Health, Communicable Disease, Epidemiological Office. This is a condition that would normally promote a Health Hazard Evaluation.

66. In the normal course of these investigations a questionnaire is designed. Diane Nebel took that questionnaire and began questioning the workers. In questioning the workers she noted that the questionnaire was originally designed to ferret out evidence of a contagious disease such as Legionaries.

67. Ms. Nebel noted that there were significant reports of coughing and respiratory problems. She then appropriately contacted the State Health Department.

68. At that time Dr. Peter Houck from the CDC was working under me. I was supervising his work. Dr. Houck determined from laboratory tests that there was not an out break of Legionellosis among that population of workers. Dr. Houck and I discussed whether the out break of the illness had an occupational component.

69. There was a prevalence of these complaints among an identified group of workers who had some common variables. We began evaluating the common environment of the workers.

70. Those common variables included: that the workers were presenting with similar signs and symptoms; they had worked in the same environment; they had worked with similar chemicals; and, they developed the same symptoms during a similar time.

71. When there was a hypothesis reached as to an occupational component to the symptoms, I became personally involved in gathering the information. As I pointed out before my work for the state was directed to surveillance of occupational diseases.

72. In January of 1989, Dr. Houck and I came to Spokane. We examined and questioned workers. We also conducted an on site inspection of the work area.

73. We then reviewed the medical and hospital records, laboratory tests, the clinical findings, the neuropsychological tests

and the neurological test findings. From that information we identified an occupational component as an etiology of the worker's diseases.

74. As I previously mentioned, the results of our epidemiological investigation of the 1988 clean up were published in a peer review journal. This means that professional peers of Dr. Houck and I reviewed whether our article, "Organic Solvent Encephalopathy: An Old Hazard Revisited," was predicated upon a sound, scientific methodology.

75. My deposition has been taken on two occasions in regard to the investigation. I have provided all of the investigative information to defense counsel. I have discussed the individual items in the investigation. Additionally, I have personally and professionally reviewed all the data collected.

76. I am familiar with organic solvents. I am familiar with the known effects of organic solvents on humans. Over the years I have done mortality surveillance of workers exposed to organic solvents. Over the years I have done Health Hazard Evaluations of workers exposed to solvents, one of which has been published. This was discussed in my deposition.

77. Further over the years I have studied the Spokane workers at the Kaiser plants. In studies that have been published, I have included information collected on the workers at the Mead Plant and the Trentwood Plant.

78. As to the Kaiser Plants in Spokane, my formal cohorts studies have been of the Mead works and not the Trentwood works.

79. I have also published for NIOSH the findings in my epidemiological studies at the Kaiser Plants in relationship to aluminum reduction. There are also respiratory sequelae to some exposures to the aluminum reduction process.

80. In conducting the investigation of the 1988 PCB clean up, we used the acceptable standard methods of epidemiological investigation, identical to the Health Hazard Evaluations done by NIOSH.

81. As I mentioned, the investigation was first begun by Ms. Nebel. Many of the variables that she was collecting information on were variables that would not only be applicable to an infection, but they would also be applicable to a toxic exposure.

82. Once I became involved in the investigation, we gathered additional data as to the chemicals at the worksite. The particulars about the worksite such as it being in a basement with air volumes at approximately 187 to 210 square meters, what the ventilation was and what personal protective gear was available and used. We also collected information as to what the vapors would have been from the chemicals in relationship to the weight of air. There was also information from the MSDS's of the chemicals used. In collecting information we considered what type of injuries would be expected to be associated with toxic exposures to these chemicals.

83. The injuries expected would be one of the variables of our investigation. Generally those variables were broken down into body systems, i.e., respiratory and neurological. We also collected information from the attending physicians on the clinical presentation of the patients. The factory officials provided us data on the workers' attendance.

84. We also considered the fact as to whether the chemical exposures could be quantified reliably. Neither Kaiser Aluminum nor General Electric was taking air samples and we were not involved early on, we were not able to exactly quantify the exposure. However, we did review purchase records as to the amount of chemical that was purchased and used to clean up the site. That information was correlated with anecdotal reports from laborers as to who worked with the chemicals and their concomitant complaints.

85. We had additional investigative work performed in terms of laboratory investigations for pathogens and PCB's. There was also further clinical work done as far as respiratory system analysis and neuropsychological testing. The additional investigative work was by objective testing. The objective tests results correlated with the investigation observations. For example the neuropsychological testing confirmed the workers' memory complaints. See page 112 of Exhibit B.

86. With neurotoxic chemicals, one of the important measuring tools is that of neuropsychological testing. I understand that other witnesses in this case have provided the Court with extensive information as to standard neuropsychological testing in the face of neurotoxic exposures.

87. As part of our investigation we compared our data

with that of previously published peer review studies. Our epidemiological investigation results were consistent with previously reported studies. A list of those studies is reflected in the attached Exhibit B.

88. Our investigation of the 1988 PCB was essentially a descriptive study. Our investigation also through analysis established that the most likely cause of the illness observed in the worker was exposure to solvents used in the clean up. Table 1 in Exhibit B identifies the prevalence of the symptoms in the exposed persons. See page 111 of Exhibit B. In reviewing Table 1 the validity of our study is borne out by the fact that the laborers, who had more exposure to the chemicals had a greater prevalence of symptoms. Further the symptoms that were presented were the ones that one would expect to find when personal protective gear had not been used with exposures to these chemicals in a confined poorly ventilated space below ground.

89. I understand the defense may be confused about whether a cohort study should have been performed. A cohort study could not be done here. To do a cohort study, there needs to be 1) a single chemical involved and 2) a large group of persons exposed. A Health Hazard Evaluation as performed was the appropriate scientific approach to take in investigating this matter.

90. Given the reliable published literature on these chemicals, it was not scientifically necessary nor possible to do a cohort study. There has been extensive scientific study proving the individual chemicals cause the conditions documented in the workers at the 1988 clean up. The investigation was to identify, which of the workers were probably manifesting signs of toxic exposure to these chemicals. The investigation was published to remind the medical and industrial community that these injuries will occur if appropriate precautions are not taken.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED and signed this 2ND day of March, 1994 at Olympia, Washington.

/s/ _____
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_____DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et. al., et. ux.,	)	NO. 92-CS-0081-FVS
Plaintiffs,	)	
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	OFFER OF PROOF BY PLAINTIFFS RE: THE TESTIMONY OF PAULA A. LANTSBERGER, M.D.
Defendants.	)	

The following Offer of Proof is submitted as to the witness PAULA A. LANTSBERGER, M.D.

DATED this 7TH day of March, 1994.

DAWSON & MEADE

/s/_____
Edward A. Dawson, WSBA #02911
Attorney for Plaintiff Carlson

PAULA A. LANTSBERGER, M.D., declares and states:

1. I am a physician licensed to practice medicine in Washington and Idaho.

2. Attached as Exhibit A is my Curriculum Vitae.

3. I have post-graduate work in Internal Medicine and Occupational Medicine. I practice in the area of Occupational Medicine.

4. As part of my routine practice, I am consulted by over a hundred employers on matters involving occupational health.

5. I am a physician who was consulted by Kaiser Aluminum and Chemical Company. I have done evaluation of workers for Kaiser here in Spokane.

6. At the request of the Spokane County Health Department I examined some of the workers involved in the 1988 PCB clean-up as an Occupational Physician.

7. I am a treating physician for Dan Skeman, Merlin Carlson, David Schudel, Timothy Schudel, Kathrene Froese, Craig Thompson, and Dan Glass.

8. I understand that extensive Offers of Proof have been prepared by other doctors involved in the investigation and evaluation of the workers in the 1988 PCB clean-up. My Offer of Proof will be less extensive since I assume the Court has been provided information on the basic science of toxic injuries.

9. I am familiar with the chemicals that were used in the 1988 clean-up. In my routine practice, I have evaluated individuals who have been exposed to the chemicals used in the 1988 clean-up.

B. <u>Occupational Medicine</u>:

10. My area of practice is Occupational Medicine. The majority of my practice involves the evaluation, treatment and care of persons in connection with their jobs. I have provided evaluation and consultation services for employers concerning the health issues of their employees. I have done pre-employment physical exams and screening of worker. I do periodic screenings of employees while they are employed. My practice also covers employees who are injured at work.

11. Employers often want pre-screening physical examinations and evaluations. Some of the reasons that employers want this information, are so that an employer can

appropriately evaluate whether a person is physically capable of handling the work, or they need base line information as to the physical and mental condition of a prospective employee.

12. When a worker is injured at work, I am a physician who manages the diagnostic process and treatment regime.

13. An occupational medicine physician is often a primary care physician. In the primary care role, an Occupational Physician often refers patients out for consultation and evaluation with other subspecialties.

14. As an Occupational Medicine physician I am familiar with the health implications of toxic materials.

15. I understand that defense counsel for Kaiser Aluminum and General Electric has suggested that the injuries that resulted from the exposure to chemicals in the 1988 PCB clean-up at the Kaiser Trentwood Plant, are undocumented events in the scientific literature. This is not true. The injuries sustained are the type scientifically expected when protective gear is not adequate or not used.

16. Over the last forty years, there has been extensive scientific research into the area of chemicals. Some of the major driving forces for the recent expansion and development of the scientific basis and the medical practice of treating toxic injuries have been addressed in the scientific literature. See attached Exhibit B[1]. Table 2.1, from Hazardous Materials Toxicology: Clinical Principals of Environmental Health, Edited by: John B. Sullivan, Jr., and Gary R. Kreiger, Williams & Wilkens, Baltimore, 1992, is just one example of information available.

17. For the Court's information, I will be referring extensively to Sullivan & Kreiger's Text in this Offer of Proof. I understand that this is a book that Plaintiff's counsel has purchased. It may make it easier for the Court to verify the information that I discuss in this Offer of Proof by referring to this text.

18. Along with many other materials, have studied this textbook and the information it imparts in detail.

19. In the practice of Occupational Medicine, I spend a considerable amount of my professional time keeping up with the current scientific literature in the area of Occupational Medicine and there related areas.

20. In Occupational Medicine, I work with a wide variety of subspecialties, including toxicologists, pulmonologists, nephrologists, internists, psychologists, psychiatrists, neuropsychologists, industrial hygienists, neurologists, orthopedists, chiropractors, physical therapists, occupational therapists, surgeons and most of the other areas of health care specialties.

21. For purposes of this Offer of Proof, I will focus my attention on toxic insults.

22. It is routine for Occupational Medicine Physicians to assess the potential of adverse effects from chemicals in the occupational environment. It is also routine for the physician to recommend the appropriate protection and precaution measures. Occupational physicians have more knowledge of toxicology than an average physician. I do not have as much knowledge as a toxicologist. When I have reached the limits of my knowledge, I consult with a toxicologist. As an Occupational Medicine Physician, I am concerned with activities relating to the study of the potential chemicals or mixtures of them and the harmful affect it may have on workers. In my scientific reading and continuing education, I have an ongoing study of the interaction between chemicals and the human biological system.

23. I am familiar with the current scientific literature on the chemicals used in the 1988 clean up.

24. I am familiar with the health issues relating to protecting the workers from injuries from these chemicals. I am familiar with the health implications of what happens to workers biologically, when they have not been protected from the chemicals. I am familiar with the diagnostic modalities for potential injuries from these chemicals. I am familiar with the current treatment regimes available for injuries caused by the chemicals in the 1988 clean up.

25. This area of toxicology is basic. There is extensive literature in this area. I keep myself apprised of the literature. I utilize the literature in planning, treating and evaluating the treatment of persons who have been injured from toxic substances.

26. I approached the evaluation and treatment of the workers in the 1988 cleanup as I would any other patients. I use the differential diagnostic process in evaluation and treatment.

The differential diagnosis process is basic to all areas of medicine.

27. In differential diagnosis process, the following activities take place.

28. A history is obtained from the patient. With injuries to workers the history is sometimes supplemented with information from family members, co-workers or other persons at the job site. History may also be obtained from other health care providers. Pertinent medical records are reviewed for information, e.g., emergency room records, pre-employment exams, etc.

29. The history obtained directs the physical exam. There are some matters that are routinely checked in all physical exams. The patient's complaint directs how detailed the exam is of certain organ systems. After the history and physical exam are done, appropriate laboratory tests and complications with other specialists are obtained.

30. The materials from the history, the physical exam, laboratory tests and consultations are reviewed and analyzed by myself. From all this information I arrive at what is known as a differential diagnosis. A differential diagnosis is a list of potential diseases or illnesses. Further history examination, laboratory tests or medical consultation is done to rule in or rule out the conditions and illnesses on the list.

31. As further evaluation and treatment are implemented, the list of potential conditions or illnesses may be reduced or expanded depending on what information becomes available in the process.

32. The process that I described is now basic medicine is practiced by most competent physicians in the United States.

33. In particular with chemical injuries as an occupational medicine physician, I consider the adverse effects that may be detrimental either to survival or normal functioning of a patient.

34. In considering the adverse effects of chemicals, I consider the chemicals or the by-product and what tissues or organ systems in the body they may potentially cause an injury to. For example, if a chemical is volatile and it can be breathed by inhalation, there are a variety of tissues and organ systems that may be impacted. The respiratory system may be effected. If the chemical crosses into the blood system it may effect the nervous

system, the cardiovascular system, the renal system, the digestive system or just about every system in the body. There may be local chemical burn injuries to the respiratory system whether it be in the nose, mouth, or down into the lungs.

35. My history taking and physical exams are directed towards observing for signs of toxicity.

36. With chemicals there may be differences in the signs of toxicity depending upon the magnitude, duration and route of exposure.

37. In assessing the patient's history and physical exam, I am looking for a dose response relationship between exposure and symptoms. Such a dose response relationship is important in determining the causal relationship between chemicals and the toxic effects.

38. With the number of chemicals in the modern work place, it is impossible for any physician, including myself, to have detailed information about particular chemicals on the top of our head. I have a general understanding of most groups of chemicals. However, with most patients part of my evaluation includes looking at the scientific literature specifically related to the family of chemicals involved in the workers' environment.

39. In evaluating Dan Skeman, Merlin Carlson, David Schudel, Timothy Schudel, Kathrene Froese, Craig Thompson and Dan Glass I specifically looked at the scientific literature on the families of chemicals involved at the work site.

40. When toxic chemicals are involved, I, as an occupational medicine physician, may see a group of patients, who have a range of common symptoms and a range of common exposure. I may use the information from one patient to assess and evaluate what is occurring in other patients. The information as to each patient is not compartmentalized in my evaluation.

41. Considering an entire group of workers with a toxic injury is a valuable medical assessment tool.

42. With neurotoxic chemicals this group consideration is invaluable. Often the most injured worker is unable to provide as detailed information as needed for a complete evaluation. The neurotoxic effects of the chemical interfere with the workers' ability to perceive, remember or report what happened. Workers that have had less of an effect from neurotoxic chemicals may be

in a better position to observe and report what happened in the common environment of the workers.

43. In the 1988 clean-up, I had some valuable baseline information as to the functioning of the workers. For example, Dan Skeman has been examined about eight weeks before he began working on the clean-up. I had baseline information as to his mental functioning, his lungs, his skin, his nervous system, and his general health. Daniel Skeman's health was significantly altered after exposure to the chemicals. Mr. Skeman was a marker or control for evaluating the impact of his experience on the other workers. The information that I garnered from my pre and post evaluation of Daniel Skeman was utilized in my evaluation and treatment of the other workers.

44. Occupational Medicine Physicians are frequently involved in assessing the potential of adverse effects from chemicals in the occupational environment. Occupational physicians are involved in making recommendations as to the appropriateness of protective gear and precautionary measures. As such, I am familiar with Material Safety Data Sheets (MSDS's), the various protective gear, and the reasons for the protective gear, and precautions.

45. In this case, as a physician, information that I often have available with other worker's injuries was not completely available here. For example, there was no monitoring of the air. There was no individual medical monitoring of the various workers for their dose exposure to the chemicals.

46. Since this information was not available, I had to go to additional means to extrapolate the relative exposure of the workers in relationship to the manifested signs and symptoms I observed and found.

47. The health hazard evaluations performed by Diane Nebel, Drs. Milham and Houck, were made available to me. Information from health hazard evaluations is used by Occupational Medicine Physicians. It is not unusual for an Occupational Medicine Physician to work with a Health Department investigation, or a Labor and Industries' Investigation of events at a work site.

48. I researched the scientific literature on the health implications of the chemicals that were present at the work site.

The scientific literature that I had pulled and reviewed in connection with the 1988 clean-up was made available in my depositions.

49. I point out to the court that in connection with this litigation, I have been deposed for days as to my evaluation, investigation, diagnosis, and treatment of all of these workers. The depositions of Dan Skeman were the longest and in the most detailed. I am assumed that counsel did not go into the same detail with the other workers, because I would have just been repeating myself in the subsequent depositions.

50. In searching the scientific literature for the health implications for chemicals, one cannot always find a specific study on a specific chemical. As a scientist, you look to the literature as to the family of chemicals. The health implications of chemicals are often interchangeable in a family of chemicals.

51. I understand that the Defendants are asserting there is no recognized authoritative basic scientific literature on the health implications of the chemicals involved in the 1988 clean-up. This is not true. Attached to this Declaration are several chapters from the textbook Hazardous Materials, Toxicology. I believe this is the most expeditious manner to identify for the Court that the health implications of these chemicals have been well research, extensively researched, and extensively published.

52. Attached as Exhibit B[2] is Chapter 64 from Hazardous Material Toxicology. This is a Chapter entitled Halogenated Solvents. The chemicals 1,1,1-trichloroethane and tetrachloroethene are halogenated solvents. This means they are organic solvents.

53. In evaluating the workers, certain chemical families are of particular concern. Two of the chemicals were 1,1,1-trichloroethane, (methylchloroform) and tetrachoroethane (PERC). Of further concern was a related chemical and trichloroethane, TCE. When certain other chemicals are also present and/or heat is present TCE can be produced in response to a chemical reaction. At the work site they were mixing chemicals. Chemical reactions would occur with the mixing of chemicals. Further TCE is expected impurity in most technical and commercial grades of halogenated solvents. See Exhibit B, Chapter 64, page 733.

54. Methylchloroform, PERC and TCE are halogenated

solvents. All these chemicals are central nervous system depressants. They cause dose-related changes in mental function depending on the individual chemical and duration of exposure.

55. There is scientific information available on concentration to which workers can be exposed short term without suffering: 1) there is sufficient change in level of consciousness to produce increased incidents of accidental injury; 2) chronic or irreversible tissue damage; and 3) respiratory tract irritation. The technical name for this safety level is threshold limit value -- short term exposure limit, TLV-STEL.

56. The TLV-STEL ratio and other similar ratio are part of the basis for determining what precautions and protective gear is needed. These levels are contained on MSDS.

57. The history I obtained is all the workers had changes in their level of consciousness while exposed to the chemicals. There were at least two workers, who were reported to suffer loss of consciousness. All the workers reported coughing and respiratory irritation. There were other symptoms of central nervous system decompensation noted in the histories, such as dizziness and blurred vision.

58. On the basis of the above more probably than not there were levels of halogenated solvents present in greater than minimal TLV-STEL amounts. As such it would be logical to expect a worker had suffered chronic or irreversible tissue damage.

59. With the above analysis in mind, I focused further history, physical exam, laboratory testing, referral to specialist and follow-up to rule in or out injury to the various target organs of halogenated solvents.

60. The above analysis also focused the supplemented scientific literature research I performed and considered.

61. The pathophysiology of halogenated solvents is well documented, i.e., see the attached chapters of one medical textbook. The diagnostic modalities for ruling in or out injury have been researched and validated. I utilized these methods in the patient work up.

62. In considering injuries I considered whether there were acute or chronic exposures. Based upon the histories, the amount of chemical used and the objective test, I believe on a

more probably than not basis the workers of the 1988 clean up had repeat acute exposures to halogenated solvents. With the repeat exposures there was a chronicity for some of the patients.

63. Central nervous system depression results from exposure to high doses of halogenated solvents. The histories indicated the workers suffered from varying degrees of central nervous system depression. To the extent possible from the history, I correlated the degree of change in consciousness with the nature of the exposure. With halogenated solvents deaths result from respiratory depression. Depending on the degree of respiratory depression there is a corresponding hypoxia. There is a correlation between the degree and duration of hypoxia with brain damage.

64. Postmortem examination of persons, dying immediately from toxic exposure to halogenated solvents, show nonspecific findings. With trichloroethane there have been documented findings of petechial hemorrhages in brain and lung tissue. Petechial hemorrhages are very tiny. See Exhibit B, Chapter 64 at page 741. In individuals who have not succumb to death, a MRI or CT scan may not show the petechial hemorrhages. The hemorrhages would be too small for the neuroradiologist to scan. For this reason the state of the art objective testing is neuropsychological testing.

65. Neuropsychological testing was performed on the workers. Some of the workers manifested significant cognitive injuries, others did not. With this type of cerebral insult there may also be concomitant or separate personality changes as well. The workers were screened for personality changes.

66. Halogenated solvents also effect the other organs of the body. The halogenated solvents probably contributed to the respiratory system injuries manifested by the exposed workers.

67. Also attached is Chapter 67 on Inorganic Acids and Bases. There are constituents of inorganic acids and bases in the chemicals used at the 1988 clean up, Exhibit C. Also attached is Chapter 68 on Organic Acids and Bases, Exhibit D. There were organic acids and bases at the worksite.

68. In the 1988 clean up, Kaiser and General Electric were apparently mixing together chemicals. There is no record of the ratio of how they were mixing together the chemicals other

than anecdotal. As far as I know there were no remaining remnants of the mixed together chemicals for evaluation. However, relying upon basic chemistry a physician can reasonably extrapolate that different chemicals were generated by mixing together the chemicals. It would be logical that as a result of the mixing together of these chemicals there would be organic and inorganic acids and bases released.

69. Exhibit E is Chapter 106 on Alkylbenzene Solvents and Aromatic Compound. Naphalene is in this family of chemicals. Naphalene was present in the chemicals used in the 1988 clean up.

70. These chapters provided to the Court are from recognized medical authorities. The chapters are set up with an overview of the chemical characteristics of the family of chemicals. A physician uses this information to evaluate and consider what potentially my happen to a worker exposed to the chemical. This information is also used to analyze and consider what potentially might happened if there are several chemicals in the environment. The chapters provide information about other things such as the diagnosis, treatment and prognosis from the exposure to the chemicals. Where applicable, there is information provided as to impurities in the chemicals. There is information provided on dose effects, whether it be from inhalation, dermal or otherwise. There is also information on what happens to these chemicals in the body as far as metabolism and on the various organ systems. There is information presented as to what one expects to see as far a clinical presentation of a patient acutely exposed to these chemicals or chronically exposed to the chemicals. The chapters also provide extensive references to public scientific journals on the family of chemicals.

71. I applied the same type of analysis as to the chemicals of other related organic solvents, such as aromatic hydrocarbons.

72. As Exhibit E indicates, there are similar health implications to this group of organic solvents as those of halogenated solvents. See table 106.1 at page 1088 in Exhibit E. The table summarizes the effects of solvent exposure. Also note a summary of the health implications and diagnostic measures. See pages 1099 to 1102 of Exhibit E.

73. The constellation of the workers signs and symptoms were consistent with the scientifically documented manifestations of solvent inducted injuries.

74. The textbook I referred to was not published at the time that I was initially evaluating the workers in the 1988 clean up. However, many of the articles cited to in the chapters were available. This would cover information that I gathered myself as well as had in my general library through years of acquiring information on chemicals.

75. In evaluating the workers I determined which, if any, specialist needed to be consulted for each patient. A patient's individual symptoms direct how consultation and testing is performed. There were some tests ordered and performed at the request of Dr. Samuel Milham. These were in connection with the Health Hazard Evaluation.

76. I also had discussions with Dr. Milham and Dr. Houck as to additional screening of the workers. Additional screening included having neuropsychological testing performed as well as methacholine challenge testing. With individual patient I have determined whether it was clinically appropriate to do this additional screening. As a physician I do not want to be wasting money on unnecessary testing.

77. The changes in Mr. Dan Skeman's mental capacity after the exposure to the chemicals, was profound and impressive. What Mr. Skeman manifested would be what one would expect from a significant acute exposure to neurotoxic chemicals such as the one at the work site. Mr. Skeman's changes in his mental capacity helped me assess the validity of the other workers' reports of memory problems and personality changes. The other workers manifested symptoms similar to Dan Skeman, but at a lesser degree.

78. In occupational medicine when there has been a toxic insult and there is a question of injury to the central or peripheral nervous system, it is state of the art to utilize neuropsychological testing.

79. Unlike a medical doctor, a neuropsychologist has specific in-depth training, education and experience in evaluating the impact on the brain of toxic insults.

80. With chemicals such as the ones in the 1988 clean up.

the damage may be microscopic. With microscopic damage it is not always possible to see that there is an injury with a MRI, CT scan or other such test. The damage to the brain is assessed the neuropsychological testing.

81. Neuropsychological testing has developed over the years. The tests are just as objective as an MRI or CT scan. They are just administered in a different way.

82. With the chemicals involved in this case, the mental impacts may be divided into several areas. The impact may be of cognitive functioning or behavioral functioning, or personality changes. There may also be a component of peripheral injury.

83. A significant amount of the literature that I reviewed and considered in connection with evaluating and treating these workers was in the area of neurotoxic neurobehavioral implications. There are two chapters in Hazardous Material Toxicology specifically related to this area. There is an extensive body of scientific literature as to these types of injuries. There have been several books published on them. The neurobehavioral and neurotoxic implications of these chemicals are covered in many other toxicology textbooks and occupational medicine textbooks.

84. Attached as Exhibit F is Chapter 13 from Hazardous Materials and Toxicology. The chapter is entitled Neurobehavior Toxicology.

85. Neurotoxic chemicals produce distinct forms of injury. Neurotoxic chemicals result in injuries that are either: 1) acute confusional state, characterized by rapid evolving deficits in arousal and attention; or 2) dementia, a persistent disorder of cognitive and emotional functioning; or 3) combination of both. See Exhibit F, page 154.

86. Attached as Exhibit G is Chapter 12 on Neurotoxicology from Hazardous Material Toxicology.

87. One of the significant presentations of all of these workers was the impact on their respiratory system. A significant majority of the workers had persistent coughs many months after the exposure. The respiratory problems of the workers have ranged in severity. I believe the range in severity is related to how much of the chemical they were exposed to in the confined space and whether or not they had personal protective gear available. In

the group of patients I saw a relationship between the degree of exposure and the severity of associated pulmonary and neurological problems.

88. In Hazardous Material Toxicology there is a wide variety of information available on pulmonary injuries. Chapter 38 addressed acute pulmonary injuries from hazardous material. There was information in that chapter that was helpful to me in evaluating individuals. However, I was not a physician actively involved in the acute phase of evaluation and treatment of these workers. Other doctors were involved in the acute phase of treatment and evaluation of these workers.

89. In reference to the acute injury there is one caveat. Since these workers were not provided information about these chemicals, I believe they were at a handicap in providing that information to the initial treating physicians. As such many of the initial treating physicians who were not occupational medicine physicians, probably did not think to ask about chemical exposure. I am placing no fault on these physicians, it is just a matter of specialty. If one does not work in the area of occupational medicine, one is not necessarily sensitive to all of the information that needs to be gathered in a history and evaluated as far as work injuries. Had I seen all these individuals on an acute basis, I would have been evaluating them for the acute respiratory response to toxic exposures to these chemicals.

90. My evaluation and treatment of the workers was in the role of the residual effects of the pulmonary injuries.

91. Based on the foregoing comments, I think it is appropriate to point out the Chapter 11 on Pulmonary Toxicology from Hazardous Materials and Toxicology. This chapter provides extensive information as to pulmonary implications of exposures to chemicals. It covers materials such as presenting signs and symptoms. The chemicals that are expected to effect the respiratory system. The manifestation of those effects. Suggestions as far as diagnostic tests and suggestions as to how those tests are interpreted. See Exhibit H.

92. Based upon my evaluations, testing, consultations and research, I believe that the workers in the 1988 clean up have varying degrees of injury to their lungs. The condition they have is known as reactive airways disease.

93. In evaluating workers for occupational injuries to their lungs, I take into account their smoking history. Smoking is not an unusual habit to find in blue collar workers.

94. In evaluating the workers in my differential diagnosis list, I considered other causes of the signs and symptoms the workers were presenting. I performed tests to rule out those other causes. Tests were performed to rule out infectious process, heavy metals and other diseases or illnesses.

95. After diagnosis was reached with each individual patient, I made appropriate referrals for rehabilitation. The rehabilitation may have been, depending on the patient, the providing of medical treatment for their respiratory problems, cognitive rehab for their brain damage and psychological counseling for the personal problems associated with the injury.

96. Many of the workers presented with complaints of joint pain. With those patients appropriate medical treatment was instituted for alleviate the joint pain.

97. Many of the workers had problems with reaction to chemicals and this was analyzed. This was analyzed in terms of straight physical responses and also in terms of psychological implications. In this area there was also the implications in changes in their cognitive functioning.

98. Medical science has recognized that there is psychological sequela following toxic insults. This area has been researched. There are various modalities for evaluating and treating individuals for the psychological sequelae resulting from a toxic exposure.

99. Chapter 42 in Hazardous Material Toxicology is entitled Psychological Sequela of Chemical and Hazardous Material Exposure. In the these workers there were varying degrees of psychological sequela following this exposure. The psychological sequela, depending upon the patient, was as a result of undergoing this experience and then having concomitant changes in their mental and biological functioning. See Exhibit I.

100. I applied a logical scientific process with each individual patient. I considered the patient's presentation as a group and individually. This would be an appropriate approach in occupational medicine.

101. My evaluations and reasoning process has been

explored extensively in days of deposition.

102. The following is a summary of the individual workers.

103. Dan Skeman, I believe, was most profoundly injured of all the workers. From history and investigation, it appears that he had one of the greater exposures. He had a lost of consciousness. Merlin Carlson also lost consciousness. His changes in his personality and function were collaborate with objective tests. Those objective tests included neuropsychological evaluations by numerous neuropsychologists. Respiratory problems, dermal problems, and behavioral problems. More probably than not Dan Skeman's change in his pulmonary function, neuropsychological function, personality problems, joint problems, skin problems, and respiratory problems was caused by the chemical exposure in the 1988 clean up. Had he had appropriate protective gear, he probably would not have been injured.

104. Merlin Carlson was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

105. Merlin Carlson has objective documentation of changes in his neuropsychological functioning, cognitive functioning, behavioral functioning. He has objective demonstrations of changes in his pulmonary system. He has reactive airway disease. He has chronic problems with joint pain, fatigue, rashes and changes in his ability to consume things, such as food. The above conditions and illnesses have been documented and evaluated by appropriately recognized medical means.

106. Merlin Carlson was more probably than not injured by the failure to have adequate respiratory and skin protection while he was working with the chemicals.

107. Tim Schudel was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

108. Tim Schudel has reported the following as a result of his exposure to toxic solvents at Kaiser in 1988: cough, rash, and memory problems. He has also reported irritability, sleep problems, and mood swings. He has reported a tightening and

squeezing sensation in his chest and increasing cough, lung problems and multiple upper respiratory infections. He has reactive airways disease syndrome. He has extreme anxiety concerning his physical health and a fear of exposure to chemicals. These complaints by Tim Schudel are consistent with exposure to toxic chemicals.

109. Tim Schudel was exposed to toxic solvents during the clean up at Kaiser in 1988; he was not provided with adequate respiratory protection, wearing only paper face masks and respirators provided by Kaiser and General Electric.

110. Tim Schudel had a pre-existing history of smoking. I took that into account in my evaluation of his exposure to toxic substances. It is fairly common that blue collar workers would smoke. A person who smoked would be susceptible to injury to the chemicals present at the 1988 clean up. Taking all of Tim Schudel's health history into account more probably than not his pre-existing health conditions were exacerbated by the unprotected exposure to the chemicals at the 1988 clean up.

111. I understand Tim Schudel has been seen by pulmonalogists. A pulmonalogists would be involved in evaluating how the different structures of the respiratory system are effected by smoking and these chemicals.

112. Craig Thompson was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

113. Craig Thompson was exposed to toxic solvents at the Kaiser clean up in 1988. I initially treated him for complaints of a cough, headaches, and memory loss. He reported that he had a "high" sensation while working at Kaiser. He also has reactive airways disease syndrome. Persons with reactive airways disease syndrome have an increased susceptibility to having more problems with upper respiratory infections, and have a more difficult time than others in clearing them because of the reactivity of their lungs. As with most of the other patients involved in this incident, he had aches and pains in his hands and legs. He has a general fear of being around anything regarded as a chemical. He has problems with organization and sequencing things to get coordinated. He has repeated infections and repeated problems with his lungs. He has shortness of breath, and a persistent cough.

114. Mr. Thompson was exposed to such toxic solvents during the Kaiser clean up in 1988. Like the other workers, he had only minimal protection, consisting of paper face masks and paper body suits.

115. Craig Thompson had pre-existing health habits which could cause problems with his lungs and liver. The scientific literature I previously identified for the Court indicates the chemicals at the 1988 clean up are metabolized out of the human body by various organs. Two of the organs involved in metabolizing these chemicals are the lungs and liver. Unhealthy lungs and liver would effect the bodies ability to metabolize and process these chemicals. I discussed the status of Craig Thompson's pre-existing health conditions in my deposition.

116. Craig Thompson's pre-existing alcohol use makes it difficult to assess the impact of neurotoxic chemicals on the brain. A person with a significant alcohol use history is more susceptible to neurological impact from neurotoxic chemicals. I referred Mr. Thompson to Dr. Paul Domitor for evaluation of these conditions.

117. Craig Thompson's pre-existing health conditions were more probably than not aggravated by his exposure to the chemicals used in the 1988 clean up.

118. Deborah Guaragna Williams was examined by me. I am one of her treating physicians.

119. Debbie Guaragna Williams had a pre-existing history of smoking. I took that into account in evaluating her. Debbie Guaragna Williams had a history of upper respiratory infections. I also understand Debbie Guaragna Williams has been extensively evaluated by Dr. Morton at the Oregon Health Science Center.

120. Debbie Guaragna Williams has been followed more extensively in Western Washington and Oregon. On the diagnosis of her present condition, I would defer to the doctors who are her primary care physicians.

121. Deborah Guaragna Williams has a history of repeated upper airway infection and upper respiratory infections. She has a history of ear infections since the exposure. She has also complained of headaches. Irritation to her mucus membranes during the exposure and resulting reactive airways disease syndrome make persons so affected more susceptible to infections

and irritation. Ms. Guaragna Williams also suffers from shortness of breath and hypersensitivity to odors. Her activity level is significantly reduced. She is easily fatigued.

122. Ms. Guaragna Williams was also exposed to toxic solvents at the Kaiser plant without adequate protection, i.e., she also had only paper face masks and suits.

123. Kathrene Froese came to me with problems of breathing and sensitivity to odors. She also complained of headaches and a cough. She also had a rash while working at Kaiser. She has an increased susceptibility to respiratory infections because of her exposure at Kaiser. She also has had problems with joint and bone aches and pains.

124. Kathrene Froese's problems are consistent with toxic poisoning. She was exposed to chemical solvents given inadequate protection, i.e., paper face masks and body suits only. She was exposed to these chemicals while working at the Kaiser plant in 1988.

125. I took into account Ms. Froese's pre-existing smoking history and intellectual ability. As I mentioned above and below, there are implications associated with smoking and lowered intellectual ability when a person is exposed to these chemicals. There are also implications as far as sorting out the test results. Kathrene Froese's pre-existing condition was more probably than not aggravated by her exposure to the chemicals.

126. Dan Glass was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

127. Dan Glass came to me for heart palpitations, memory loss, and a rash. He also complained of irritability and depression.

128. Such symptoms are consistent with toxic poisoning. Mr. Glass was exposed to toxic solvents while working at the Kaiser Aluminum plant in 1988; he was provided only with a paper suit for protection.

129. I took Dan Glass's pre-existing health and intellectual condition into account in evaluating him. Dan Glass through the years was in special education programs. He has a relatively low intellectual capacity. This is not atypical in blue collar workers who are performing jobs such as Dan Glass did. A

pre-existing low intellectual ability makes it difficult to evaluate a person's neuropsychologically because their scores are so low. A person with a pre-existing low I.Q. has more to loose than someone with average or higher I.Q. More probably than not the exposure to the chemicals aggravated Dan Glass's pre-existing condition, including his limited intellectual ability.

130. David Schudel was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

131. David Schudel came to me for a persistent cough and memory problems. He later stated that cleaners, solvents, and other fumes caused him breathing problems. He also had a rash following his chemical exposure to Kaiser. He has also developed a baseline obstruction of the small and large airways. He also has a fear and aversion to chemicals or anything that can be regarded as a chemical. The exposure at Kaiser was the inciting incident for his subsequent development of the fear of chemicals. He has also complained of depression. It is necessary for his to use an air purification device in his house. He has adult on-set asthma and also bone and joint aching.

132. David Schudel has a history of smoking. As I mentioned with the previous workers, the fact that a blue collar worker smokes is not atypical. The pathophysiological dynamics that I previous mentioned with the other workers would be applicable to David Schudel.

133. I took Mr. David Schudel's pre-existing smoking history into account in evaluating him. More probably than not the exposure to the chemicals aggravated the pre-existing status of his lungs.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED and signed this 7 day of March, 1994 in Spokane, Washington.

/s/_____
Paula Lantsberger, M.D.

Supreme Court, U.S.
F I L E D
1997
CLERK

Nos. 97-1382, 97-1386 and 97-1410

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS, and related parties,

Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), governed the admissibility of the scientific evidence in this diversity case and properly applied those standards?

2. Whether the court of appeals could and properly did apply amendments to the Federal Rules of Civil Procedure to a then-pending case as expressly authorized by the Rules and the enacting Order of this Court?

LIST OF PARTIES

Petitioners in No. 97-1382 are David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, Kathrene Rae Howell Thompson Froese, and Craig Thompson [hereinafter, collectively, "Schudel"] and Deborah Guaranga Williams [hereinafter, "Williams"]. Schudel was plaintiff in the district court and appellant in the court of appeals. Williams was plaintiff in the district court and appellee in the court of appeals.

Petitioners in No. 97-1386 are Ruth Hopkins and John Hopkins [hereinafter, jointly, "Hopkins"]. Hopkins incorrectly identifies himself as having been appellee in the court of appeals. (Hopkins Pet. at iii.) Hopkins, plaintiff in the district court, was appellant in the court of appeals.

Petitioner in No. 97-1410 is Merlin E. Carlson, Jr. [hereinafter, "Carlson"]. Carlson was plaintiff in the district court and appellant in the court of appeals.

Respondents are the General Electric Company and Kaiser Aluminum and Chemical Corporation [hereinafter, jointly, "General Electric"]. Petitioners incorrectly identified one of the Respondents as Kaiser Aluminum and Chemical Corporation/Kaiser Aluminum Corporation (Hopkins Pet. at iii; Schudel/Williams Pet. at ii.) Kaiser Aluminum Corporation is not and has not been a party to the proceeding.

RULE 29.6 LIST

The General Electric Company is a publicly held corporation with no parent companies. Its nonwholly owned subsidiaries are CAMCO, Inc. (Canada); Credit Del'Est; Finax FS AB; Finax KK AB; Gate Finance Corporation; GE Capital Aviation Services, Ltd; GE Capital Mortgage Services, Inc.; GE Capital (NZ) Ltd. (New Zealand); GE Capital PTY LTD. (Australia); GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; General Electric Capital Corporation; General Electric Capital Services, Inc.; General Electric Credit International, N.V.; GNA Corporation; Imaging Financial Services, Inc.; International GE Capital Corporation; Mercur Bank (Austria); Montgomery Ward & Company, Inc.; Outlet Broadcasting, Inc.; and Service Bank GmbH.

Kaiser Aluminum and Chemical Corporation is a wholly owned subsidiary of Kaiser Aluminum Corporation. Maxxam, Inc. is, in turn, the parent of Kaiser Aluminum Corporation. Kaiser Aluminum and Chemical Corporation has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 LIST	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
A. District Court Proceedings	3
B. Court of Appeals Proceedings	6
SUMMARY OF THE ARGUMENT	8
REASONS FOR DENYING THE WRIT	9
I. THE DECISION BELOW RAISED NO NEW ISSUE, MUCH LESS A COMPELLING ISSUE, WITH RESPECT TO *DAUBERT* AND PROPERLY HELD THAT *DAUBERT* APPLIED TO A DIVERSITY CASE PENDING IN FEDERAL COURT	9
II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS, WHICH HAVE READILY AND UNIFORMLY ACTED WITHIN THEIR DISCRETION IN APPLYING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE TO A THEN-PENDING CASE IN ACCORDANCE WITH THE EXPRESS INSTRUCTIONS OF THIS COURT	15
CONCLUSION	27

TABLE OF AUTHORITIES

CASES — Page

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 8
Barber v. Whirlpool Corp., 34 F.3d 1268 (CA4 1994) 18, 23
Barbour v. Merrill, 48 F.3d 1270 (CADC 1995) 17, 23
Barrow v. Wethersfield Police Dep't, 66 F.3d 466 (CA2 1995) 17
Bayer v. United States Dep't of Treasury, 956 F.2d 330 (CADC 1992) 17
Buchanan v. Sherrill, 51 F.3d 227 (CA10 1995) 25
Burt v. Ware, 14 F.3d 256 (CA5 1994) 18, 22, 23
Cabrerra v. Cordis Corp., 134 F.3d 1418, ——, 1998 U.S. App. LEXIS 1245 (CA9 1998) 14
Chenault v. United States Postal Serv., 37 F.3d 535 (CA9 1994) 24
Chudasama v. Mazda Motor Corp., 123 F.3d 1353 (CA11 1997) 20
Claar v. Burlington N. R.R. Co., 29 F.3d 499 (CA9 1994) 13
Cleveland v. Porca Co., 38 F.3d 289 (CA7 1994) 19, 23
Cole v. Ruidosa Mun. Sch., 43 F.3d 1373 (CA10 1994) 20, 23
Conley v. Gibson, 355 U.S. 41 (1957) 22
Crane v. Hahlo, 528 U.S. 142 (1922) 24
Cunningham v. Waters Tan & Co., 65 F.3d 1351 (CA7 1995) 19
Dahn v. United States, 77 F.3d 492 (Table), 1996 U.S. App. LEXIS 2801 (CA10 1996) 20
Daniel Int'l Corp. v. Fishbach & Moore, Inc., 916 F.2d 1061 (CA5 1990) 26
Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) 3, 6, 10, 11
Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311 (CA9 1995) 11, 12, 13, 14
Dawsey v. Olin Corp., 782 F.2d 1254 (CA5 1986) 10
Delgado-Brunet v. Clark, 93 F.3d 339 (CA7 1996) 19
Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs, 32 F.3d 1436 (CA10 1994) 20
Elliott v. Tilton, 64 F.3d 213 (CA5 1995) 18

TABLE OF AUTHORITIES—Continued

	Page
Erie R. Co. v. Tomkins, 304 U.S. 64 (1938)	10
Espinoza v. United States, 52 F.3d 838 (CA10 1995)	20
Ex parte Collett, 337 U.S. 55 (1949)	24
Ford v. Elsbury, 32 F.3d 931 (CA5 1994)	18, 23
Freund v. Fleetwood Enters., Inc., 956 F.2d 354 (CA1 1992)	17
Frye v. United States, 293 F. 1013 (CADC 1923)	10
G.F. Co. v. Pan Ocean Shipping Co., 23 F.3d 1498 (CA9 1994)	20, 21
Garcia v. Wash, 20 F.3d 608 (CA5 1994)	18, 23
General Electric v. Joiner, 118 S. Ct. 512, 139 L.Ed.2d 508 (1997)	11
Generes, In re, 69 F.3d 821 (CA7 1995)	19
Hill v. United States Postal Serv., 961 F.2d 153 (CA11 1992)	21, 23
Hopkins v. Dow Corning Corp., 33 F.3d 1116 (CA9 1994)	13
Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S. Ct. 1871 (1997)	24
Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990)	23
Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund, 25 F.3d 509 (CA7 1994)	19
Landgraf v. USI Film Prods., 511 U.S. 244 (1994)	21, 22
Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co., 19 F.3d 444 (CA9 1994)	20, 23
Long v. Simmons, 77 F.3d 878 (CA5 1996)	18, 23
Lust v. Merrell Dow Pharms., Inc., 89 F.3d 594 (CA9 1996)	13
Magnusen v. Video Yesteryear, 85 F.3d 1424 (CA9 1996)	25, 26
MCI Telecoms Corp. v. Teleconcepts, Inc., 71 F.3d 1086 (CA3 1995)	17
Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333 (CA7 1989)	15
Narey v. Dean, 32 F.3d 1521 (CA11 1994)	21, 22, 23

TABLE OF AUTHORITIES—Continued

Page

O'Donoghue v. Riggs, 73 Wash. 2d 814, 440 P.2d 823 (1968) 11
People v. Leahy, 8 Cal. 4th 587, 882 P.2d 321 (1994) 10
Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298 (CA3 1995) 17
Porter v. Whitehall Labs., Inc., 9 F.3d 607 (CA7 1993) 12
Ridder v. City of Springfield, 109 F.3d 288 (CA6 1997) 18
Ridder v. City of Springfield, 1997 U.S. App. LEXIS 5118 (CA6 Mar. 13, 1997) 18
Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (CA7 1996) 12, 15
Runfola & Assocs. v. Spectrum Reporting II, Inc., 88 F.3d 368 (CA6 1996) 19
Salley v. Board of Governors, University of North Carolina, Chapel Hill, N.C., 136 F.R.D. 417 (MDNC 1991) 25
Schroeder v. McDonald, 55 F.3d 454 (CA9 1995) .. 19, 23
Schudel v. General Elec. Co., 120 F.3d 991 (CA9 1997) 1, 14
Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (CA4 1986) 10
Search of Premises Known as 6455 South Yosemite, Englewood, Colo., In re, 897 F.2d 1549 (CA10 1990) 20
Silva v. Witschen, 19 F.3d 725 (CA1 1994) 17
Silvious v. Pharaon, 54 F.3d 697 (CA11 1995) 20
Skoczylas v. Federal Bureau of Prisons, 961 F.2d 543 (CA5 1992) 18, 23
Spurlock v. Demby, 48 F.3d 1219 (Table), 1995 U.S. App. LEXIS 4321 (CA6 1995) 19
Stutzman v. CRST, Inc., 997 F.2d 291 (CA7 1993) 10
United Indus., Inc. v. Simon-Hartley, Ltd., 91 F.3d 762 (CA5 1996) 18
United States ex rel. Atkins v. Reiten, 313 F.2d 673 (CA9 1963) 21

TABLE OF AUTHORITIES—Continued

Page

United States v. 51 Pieces of Real Property, 17 F.3d 1306 (CA10 1994) 24
United States v. Amador-Galvan, 9 F.3d 1414 (CA9 1993) 13
United States v. Duke, 50 F.3d 571 (CA8 1995) ..19, 21, 23
United States v. Platero, 72 F.3d 806 (CA10 1995) 20
United States v. Rahm, 993 F.2d 1405 (CA9 1993) .. 13
United States v. Rincon, 28 F.3d 921 (CA9 1994) .. 13
United States v. Roberts, 88 F.3d 872 (CA10 1996) 16, 26
Virgo v. Rivera Beach Assocs., 30 F.3d 1350 (CA11 1994) 21, 23
Wallis v. J.R. Simplot Co., 26 F.3d 885 (CA9 1994) 20, 23
Woods v. Indiana Univ.-Purdue Univ., 996 F.2d 880 (CA7 1993) 19
Wright v. Willamette Indus., Inc., 91 F.3d 1105 (CA8 1996) 12, 14

RULES

Federal Rule of Appellate Procedure 3 .....17, 18, 19, 20
Federal Rule of Appellate Procedure 4 .....18, 19, 20, 21, 24
Federal Rule of Appellate Procedure 25 24
Federal Rule of Appellate Procedure 26 ..... 19, 24
Federal Rule of Appellate Procedure 28 22
Federal Rule of Civil Procedure 4 ..... 17, 20
Federal Rule of Civil Procedure 11 .....17, 18, 19
Federal Rule of Civil Procedure 15 .....17, 18, 19, 20, 21
Federal Rule of Civil Procedure 26 19
Federal Rule of Civil Procedure 33 20
Federal Rule of Civil Procedure 49 8
Federal Rule of Civil Procedure 50 .....5, 16, 24, 25
Federal Rule of Civil Procedure 54 18
Federal Rule of Civil Procedure 59 .....5, 16, 18
Federal Rule of Civil Procedure 83 24
Federal Rule of Criminal Procedure 41 20
Federal Rule of Evidence 101 10
Federal Rule of Evidence 104 3

TABLE OF AUTHORITIES—Continued

	Page
Federal Rule of Evidence 412	20
Federal Rule of Evidence 413	17
Federal Rule of Evidence 702	3, 10, 11, 13
Wash. (E.D.) L.R. 1.2(d)(1)	25
STATUTES	
18 U.S.C. §§ 1693-1699, 1729 (1982)	25
28 U.S.C. § 1254(1) (1998)	2
28 U.S.C. § 1291 (1998)	8
28 U.S.C. § 2071 (1997)	24
28 U.S.C. § 2074(a) (1997)	17
39 U.S.C. §§ 601-606 (1982)	25
Pub. L. No. 104-208, Div. A, Title I, § 101(a) (1996)	17
REGULATIONS	
39 C.F.R. Parts 310, 320 (1995)	25
44 Fed. Reg. 61,181 (Oct. 24, 1979)	25
MISCELLANEOUS	
Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), 161 F.R.D. 149 (1995)	9, 16
Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Criminal Procedure (April 22, 1993), 146 F.R.D. 404 (1993)	16
Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Evidence (April 30, 1997), 134 F.R.D. 495 (1991)	17

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the court of appeals is published at 120 F.3d 991 (CA9 1997) and is reproduced in its entirety in each of Petitioners' Appendices. (Schudel/Williams Pet. App. at 1-15; Hopkins Pet. App. at 1-15; Carlson Pet. App. at A-1-A-15.) The opinion of the district court is unpublished and is reproduced in its entirety in the Schudel/Williams Appendix and the Carlson Appendix, and approximately ten of its 43 pages are reproduced in the Hopkins Appendix. (Schudel/Williams Pet.

App. at 19-61; Carlson Pet. App. at A-16-A-44; Hopkins Pet. App. at 19-28.) [Hereinafter, for the Court's convenience, all Appendix citations ("Pet. App.") refer to the Schudel/Williams Appendix.]

JURISDICTION

The court of appeals held that it lacked jurisdiction to review the district court's post-trial rulings and subsequent grant of a new trial as to Carlson, Hopkins, and one of the Schudel plaintiffs (Froese). The court of appeals dismissed their appeals. (Pet. App. at 15.)

The court of appeals exercised its jurisdiction to review the district court's post-trial rulings and subsequent grant of judgment against the remaining Schudel plaintiffs. The court of appeals reversed those judgments, reversed the denial of General Electric's alternative motion for new trials, and remanded. (Pet. App. at 15.)

The court of appeals exercised its jurisdiction to review the judgment entered on the jury verdict in favor of Williams. The court of appeals found Williams' expert testimony on causation inadmissible, vacated her judgment, reversed the denial of General Electric's motion for new trial, and remanded. (Pet. App. at 15.)

No party has a judgment at this time. This Court may accept a writ of certiorari to review the various rulings of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1998).

STATEMENT OF THE CASE

In the fall of 1988, Kaiser Aluminum and Chemical Corporation contracted with the General Electric Company to strip polychlorinated biphenyls ("PCBs") from five utility rooms in Kaiser's Trentwood facility outside of Spokane, Washington. The bulk of the work was manual labor—scraping and scrubbing down walls and pipes with detergents and solvent degreasers which would adsorb the PCBs. The job lasted about eight weeks. In this diversity

case, nine plaintiffs (petitioners here) alleged they developed myriad neurological and respiratory problems from working with those detergents and solvents.[1]

A. District Court Proceedings

Several months before trial, General Electric filed extensive pre-trial motions, including challenges to the admissibility of certain scientific evidence in accordance with Federal Rules of Evidence 104(a) and 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). General Electric challenged in particular the soundness and scientific reliability of, and the methodology employed by plaintiffs' experts in reaching, the unprecedented opinion that plaintiffs collectively suffered from disabling solvent-induced encephalopathy, *i.e.*, diffuse brain damage, secondary to brief occupational exposures to products containing the solvents trichloroethane ("TCA") and perchloroethylene ("Perc").

Although it never held the "*Daubert* hearing" requested by all parties, the district court eventually ruled that a "question of fact" existed as to whether, and how, plaintiffs had been neurologically injured by solvents. The court made no findings at any time as to whether, or how, the methodology underlying plaintiffs' experts' theories of causation rose to the level of "scientific knowledge" required by *Daubert* in the absence of any accepted methodology or supporting literature.

At trial, plaintiffs' expert witnesses testified over General Electric's objections that plaintiffs as a group had suffered "brain damage" and other neurological injuries ranging from "toxic encephalopathy" to "whole person

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[1] The personal injury claims included headache, rash, bone pain, overall body pain, fatigue, Pavlovian responses to odors, memory loss, upper respiratory infections, Reactive Airways Dysfunction Syndrome, brain dysfunction, alterations in consciousness, and other ailments. (Pet. App. at 24-51.) The tenth plaintiff-petitioner asserted a loss consortium claim. (Pet. App. at 69-70.)

aggravation." [2] This testimony was allowed, and was considered by the jury, although as the court of appeals ultimately found, it had no scientific basis:

- Plaintiffs' experts "conceded that only five organic solvents, none of which were involved in this case, had been proven to be neurotoxic." (Pet. App. at 13.) Plaintiffs' experts further "admitted that medical science has not determined the effects of short-term exposure to the solvents involved." (Pet. App. at 14.)

- Plaintiffs' experts admitted that "it would be improper to infer conclusions as to the toxicity of TCA and Perc based on the toxicity of other solvents." (Pet. App. at 13.) Certainly, these experts "did not establish it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals; indeed the testimony indicated small differences in molecular structure often have significant consequences." (Pet. App. at 12.)

- Plaintiffs' experts acknowledged—inapposite to the facts of the case—"that repeated exposure to nonpersistent toxins such as organic solvents over a long period must be documented to establish a causal relationship." (Pet. App. at 13.)

- Plaintiffs' experts found no relevant or reliable data on TCA or Perc on which to rely. (Pet. App. at 13-15.) To the extent the experts referred to any scientific data at all, "[e]xtrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable." (Pet. App. at 13.)

- One of the plaintiffs' experts testified only to "possibilities" rather than "probabilities." (Pet. App. at 14; *see also* Pet. App. at 24-51 (district court opin-

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[2] Hopkins suggests that he offered "[u]nchallenged trial testimony" with respect to his "severe" injuries. (Hopkins Pet. at 5.) The assertion is acutely wrong but is irrelevant to the writ.

ion).) In the alternative, after she "admitted she could not testify to a specific cause and effect relationship," she "relied instead on a 'whole person aggravation' theory without establishing that the theory had a scientific basis." (Pet. App. at 14.)

At the end of the trial, and largely because of what the district court described as "plaintiffs' choice of tactics" in unfairly and improperly presenting their causation case (Pet. App. at 52), verdicts were returned in favor of all plaintiffs. Thus, when General Electric timely filed post-trial motions, including a second renewed motion for judgment as a matter of law and a motion for a new trial, both supported with extensive memoranda, the district court granted General Electric substantial relief: the court concluded (1) that five plaintiffs had failed to present any expert evidence which was scientifically sound or causally sufficient and therefore entered judgment as a matter of law in favor of General Electric on those plaintiffs' claims; and (2) that four plaintiffs presented claims which were inexorably contaminated with unscientific and/or insupportable expert opinion and therefore granted General Electric a new trial on those plaintiffs' claims.[3] (Pet. App. at 24-52, 60.) Only Williams' verdict was not disturbed. (Pet. App. 43, 53, 60.) In its order, the district court also rejected the argument of Schudel and Hopkins that General Electric had improperly served its post-trial motions upon them because General Electric had mailed the motions by Federal Express rather than by postal delivery. (Pet. App. at 19-21.)

On cross-motions of the parties, the trial court certified as final the judgments entered on the claims of the six

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[3] Carlson incorrectly asserts that the district court ruled pursuant to Federal Rule of Civil Procedure 59(d) (motion on court's initiative). (Carlson Pet. at 8, 22-24.) The record is to the contrary, as the court of appeals held: "The district court ordered a new trial under Rule 50(b)." (Pet. App. at 7 n.9.) *See also* Schudel Pet. at 4 ("trial court did not act under its Rule 59(d) authority").

plaintiffs whose cases were fully disposed of, *i.e.*, the five plaintiffs against whom judgment was entered and the one plaintiff in whose favor judgment was entered. (Pet. App. at 71-74.) The court declined to enter final judgment on any claim with respect to the four "new trial" plaintiffs. (Pet. App. at 73.)

B. Court of Appeals Proceedings

On January 24, 1995, General Electric timely noticed its appeal from the judgment entered in favor of Williams. All plaintiffs other than Williams cross-appealed by notice dated February 7, 1995.

In addressing General Electric's substantive appeal with respect to Williams, the court of appeals properly focused on *Daubert*: "Scientific knowledge is reliable if it is 'ground[ed] in the methods and procedures of science' and 'connotes more than subjective belief or unsupported speculation.'" (Pet. App. at 10-11 (quoting *Daubert*, 509 U.S. at 590).) "In determining reliability, '[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate.'" (Pet. App. at 11 (quoting *Daubert*, 509 U.S. at 595).)

The court of appeals then correctly determined that the district court had erred in allowing the testimony of Williams' experts, who had made "no showing" that their methods were scientifically sound. (Pet. App. at 13.) Thus, the principles and methodology underlying Williams' experts' opinions "did not meet *Daubert's* requirement of reliability." (Pet. App. at 12, 12-15.)[4] The court of appeals also properly concluded that "[a]dmission of the challenged evidence was prejudicial . . . because it was the sole causation evidence with respect to Williams' neurological symptoms." (Pet. App. at 14.) The court of appeals therefore vacated the judgment entered on the

[4] The court of appeals found that one of Williams' experts in fact failed to meet *both* the reliability *and* the relevance prongs of *Daubert*. (Pet. App. at 14.)

jury verdict in Williams' favor and remanded for a new trial which will address the other (non-neurological) injuries Williams claimed. (Pet. App. at 15.)

In addressing Schudel's substantive appeal (with respect to those plaintiffs against whom judgment had been entered on General Electric's post-trial motions), the court of appeals found that the district court "properly concluded that [Schudel's expert's] testimony based on the 'whole person aggravation' theory of causation did not meet the standard of *Daubert* . . . and should have been excluded." (Pet. App. at 9.) The court of appeals found prejudicial error, however, in the *timing* of such exclusion. Because the jury had rendered its verdict based on the improperly admitted evidence, the court of appeals found that the district court no longer had discretion to grant judgment as a matter of law in favor of General Electric and was instead restricted to ordering a new trial. (Pet. App. at 8-10.) The court of appeals therefore reversed the grant of judgment as matter of law in favor of General Electric and remanded. (Pet. App. at 10, 15.)

The Ninth Circuit dismissed the appeals of those plaintiffs who were subject to the district court's new trial order and whose only reviewable issue was a procedural objection to service by Federal Express. (Pet. App. at 4-7, 15.)[5] Although disagreeing with the district court's finding that Federal Express service was the equivalent of service by mail, the court of appeals found the issue moot in light of amendments to the Federal Rules of Civil Procedure which made clear that the timely filing of post-trial motions rather than the method or date of service preserved a party's right to post-trial review. (Pet. App. at 4-5.) The court of appeals did not conclude that

[5] The court of appeals' procedural ruling applied to nine of the plaintiffs. Six of those plaintiffs also were parties to the merits-appeals which the court of appeals went on to consider. *See infra*, text at 6-7.

service was in fact untimely or address any of General Electric's alternative arguments on service, and it did not need to do so.

The court of appeals also dismissed the appeal of plaintiff Carlson, who was subject to the new trial order and presented no reviewable issue. (Pet. App. at 5-7, 15.)[6]

In light of the remands, all parties are now before the district court. The district court will conduct new trials with respect to those plaintiffs who had both sufficient (*i.e.* more-probable-than-not) and admissible evidence of injury consistent with the rulings of the court of appeals and with those rulings of the district court which were not disturbed on appeal.

SUMMARY OF ARGUMENT

Petitioners bring two primary arguments to the Court. Neither warrants the Court's exercise of its extraordinary and discretionary *certiorari* jurisdiction.

First, petitioners take issue with the application of *Daubert* in this case. Contrary to their assertions, *Daubert* does apply to diversity cases, and the court of appeals

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[6] Carlson and Hopkins argue that it was a "departure from usual and accepted judicial procedure, justifying this Court's exercise of its supervisory powers," for the court of appeals to decline to rule on the merits of their appeals. (Hopkins Pet. at 25-29; *see* Carlson Pet. at 24-25.) Carlson and Hopkins also each advance here their positions on the merits of those issues they claim the court of appeals should have reached, but did not. (For example, Carlson argues that the district court "*sua sponte* resurrected subissues that both parties and the court had earlier waived under [Federal Rule of Civil Procedure] 49(a)." (Carlson Pet. at 22.) Similarly, Hopkins argues that General Electric "failed to preserve any issue relative to the jury instructions." (Hopkins Pet. at 28-29.)) It is settled law that the courts of appeal have general jurisdiction only over final judgments and that orders granting new trials are interlocutory and not immediately appealable. *E.g.*, 28 U.S.C. § 1291 (1998); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). General Electric does not otherwise address these arguments in its opposition.

(like all of its sister circuits) required of petitioners exactly what *Daubert* itself requires—that they make some logical showing that their experts' opinions were grounded in good science. The court of appeals correctly reviewed the district court's rulings and correctly concluded that petitioners had made "no showing" of reliability. Petitioners' disagreement with the court of appeals' conclusion does not rise to the level of a *certiorari* concern.

Second, petitioners object to the court of appeals' discretionary determination that it would apply the amendments to the Federal Rules of Civil Procedure to this case, which was pending at the time of the amendments. Petitioners' arguments ignore this Court's instructions to the federal courts in this regard: the amendments "shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), *reprinted in* 161 F.R.D. 149 (1995). Petitioners' arguments also ignore the entirely uniform application of this Court's Order in dozens of decisions of the federal courts of appeals, including the decision below. No new or important issue was decided by the court of appeals, and no *certiorari* considerations are implicated by the court of appeals' decision.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW RAISED NO NEW ISSUE, MUCH LESS A COMPELLING ISSUE, WITH RESPECT TO *DAUBERT* AND PROPERLY HELD THAT *DAUBERT* APPLIED TO A DIVERSITY CASE PENDING IN FEDERAL COURT.

Petitioners Williams and Carlson contend that the district court, or the court of appeals, or both, erred in applying *Daubert* under the facts of this case. The decisions below did not raise any new issue, much less a

compelling issue justifying the exercise of this Court's *certiorari* jurisdiction, with respect to *Daubert*.

1. Carlson argues that the *Erie* Doctrine dictates that evidence need not be admissible under *Daubert* so long as the evidence is of the type which may be "sufficient" to sustain a judgment under state substantive law. (Carlson Pet. at 13-15 (citing *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938).) His position is wrong. The Federal Rules of Evidence, including Rule 702 and hence *Daubert*, as a general matter govern the admissibility of all evidence in all cases—including diversity cases—in federal courts. If a Federal Rule of Evidence covers a point in dispute, Congress has mandated that such Rule be followed. *See* Fed. R. Evid. 101. Thus, in *Daubert*, itself a diversity case from California, this Court stated that because it was basing its decision "on the content of the congressionally-enacted Federal Rules of Evidence," it did not need to address the *Erie* Doctrine. 509 U.S. at 589 n.6.[7] *See also, e.g., Stutzman v. CRST, Inc.*, 997 F.2d 291, 295 (CA7 1993) ("We hold that the Federal Rules of Evidence govern the admissibility of expert testimony in federal diversity cases."); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1054 (CA4 1986) (same); *Dawsey v. Olin Corp.*, 782 F.2d 1254 (CA5 1986) (same).

Moreover, Carlson misstates the facts when he asserts that the federal courts cannot apply *Daubert* in a manner consistent with Washington state law. (Carlson Pet. at 9-17.) The *Schudel* court specifically referred to the Washington state sufficiency standard in addressing the relevance prong of *Daubert*. (Pet. App. at 11.) The *Schudel* court properly held:

> A court's determination of relevance must consider the applicable substantive standard. Under Wash-

[7] When *Daubert* was issued, California state courts applied (and even now still apply) the entirely different admissibility standards of *Kelly/Frye*. *E.g., People v. Leahy*, 8 Cal. 4th 587, 597-604, 882 P.2d 321, 323 (1994) (citing *Frye v. United States*, 293 F. 1013 (CADC 1923)).

> ington tort law, a plaintiff must show that "the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 73 Wash. 2d 814, [824], 440 P.2d 823, 830 (1968). . . . Under this standard, we held in *Daubert II* that expert testimony offered to prove causation did not satisfy the relevance requirement because the evidence suggested only that use of the drug at issue "could *possibly* have caused plaintiffs' injuries," rather than "more likely than not" caused the injuries. . . .

(Pet. App. at 11 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320-22 (CA9 1995) (*Daubert II*) (emphasis in original).) The district court had properly identified the same standard. (Pet. App. at 46 (quoting *O'Donoghue*, 73 Wash. 2d at 824, 440 P.2d at 830) (a "might have" or "possibly did" opinion is "nothing more than conjecture").)

2. If *Daubert* applies, which of course it does, Carlson and Williams alternatively seek clarification as to whether *Daubert* should be read to accept more expert witness opinions, or fewer. (Carlson Pet. at 10-13; Williams Pet. at 18-19.) This results-oriented equation mocks the purpose of the *Daubert* inquiry. *Daubert* and its progeny direct the court's focus to the quality, not the quantity, of expert opinion that is admissible under Federal Rule of Evidence 702. The burden on the trial court is to conduct a highly fact-bound, flexible inquiry as to the reliability and relevance of the testimony. *Daubert*, 509 U.S. at 592-95; *General Electric v. Joiner*, 118 S. Ct. 512, 139 L. Ed. 2d 508, 517-18 (1997). This exercise assuredly sometimes results in the admission of opinion evidence and sometimes results in the exclusion of such evidence. That different facts compel different results suggests only that the federal courts are heeding the directive of this Court to act as a case-specific "gatekeeper" in evaluating each time whether scientific opinion evidence "is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 139 L. Ed. 2d at 519.

3. Williams argues that in this particular case the court of appeals went too far in assuring scientific reliability, but she mischaracterizes the court of appeals' reasoning in rejecting the testimony of her experts. In particular, it is simply wrong to claim, as Williams does, that there was "insistence by the Ninth Circuit opinion below that there be peer-reviewed (specific to the chemical and dosage) literature." (Williams Pet. at 27; *see also* Williams Pet. at 26 (accusing court of appeals of adopting "concept that peer-reviewed studies of the specific organic solvents used at the precise dosages are the only relevant method of evaluating scientific reliability").) Rather, the court of appeals found a complete lack of evidence that the testimony was grounded in good science: "Extrapolation was necessary to make the studies relevant, and *there was no showing that the necessary extrapolation was scientifically acceptable.*" (Pet. App. at 13 (emphasis added).) Such analysis was neither unusual nor improper; to the contrary, it reflected exactly the nature of the inquiry undertaken in every circuit that has had the opportunity to apply *Daubert* in the context of novel medical causation opinion testimony. *E.g.*, *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107-08 (CA8 1996) (analytical gap in opinion failed *Daubert* standards because it improperly left jury to speculate about whether exposure was sufficient to cause injury); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (CA7 1996) ("[w]e are baffled" by expert's failure to make "elementary distinction[s]" regarding exposure and dose); *Daubert II*, 43 F.3d at 1315-1316, 1319 (bald assurances of reliability fail *Daubert* test); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 614 (CA7 1993) ("[i]f experts cannot tie their assessments of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the experts' testimony is not helpful to the jury," and so such testimony is inadmissible under *Daubert*).

4. Williams complains that the court of appeals' opinion "fails to identify what standard of appellate review is

being undertaken," and she concurrently insists that the court must have applied an improper one. (Williams Pet. at 20.) Her argument is not supported by the record.

a. First, the standard of review was not disputed by any party to the appeal. Both Williams and General Electric requested abuse of discretion review on evidentiary matters, an unsurprising request given that the Ninth Circuit had expressly adopted and consistently applied this standard—not only on the admission of expert testimony in general but also on *Daubert* issues in particular —well before the opinion issued here. *See Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 596 (CA9 1996) (abuse of discretion standard applies to decision to admit expert testimony under Fed. R. Evid. 702 and *Daubert*); *Daubert II*, 43 F.3d at 1315 (same); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1123 (CA9 1994) (same); *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 500 (CA9 1994) (same, phrased as "manifestly erroneous"); *United States v. Rincon*, 28 F.3d 921, 923 (CA9 1994) (same); *see also, e.g., United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (CA9 1993) (abuse of discretion review applies to rulings on admissibility of expert testimony) (pre-*Daubert*); *United States v. Rahm*, 993 F.2d 1405, 1409-10 (CA9 1993) (same) (citing cases). There is simply no reason to believe that the court of appeals unilaterally and *sub silentio* selected a different standard uniquely for this case.

b. Second, in the first part of its opinion addressing General Electric's appeal, the Ninth Circuit explicitly upheld the district court as properly having "acted within its discretion" in allowing Williams' experts to base their opinions on certain data. (Pet. App. at 12.) Williams fails even to acknowledge this point and cannot reconcile it with her assertions. It is absurd to suppose (and to seek *certiorari* on the supposition) that the court of appeals employed a different standard depending on which aspect of the experts' opinions was under review.

c. Certainly there is no confusion within the Ninth Circuit as to the standard of review that the *Schudel* court applied. In its most recent writing on the subject, the Ninth Circuit has summarized the *Schudel* holding thus: "district court *abused its discretion* in admitting expert testimony when witness 'could not testify to a specific cause and effect relationship . . . between exposure and health problems.'" *Cabrerra v. Cordis Corp.*, 134 F.3d 1418, ——, 1998 U.S. App. LEXIS 1245, *13 (CA9 1998) (citing *Schudel*, 120 F.3d at 997) (ellipsis in original; emphasis added).

d. Finally, Williams' accusations about what the court of appeals "ignored" are grossly speculative. The record on appeal was extensive and included trial testimony, voir dire, affidavits and offers of proof prepared by counsel —all appropriate to the question of whether the district court had abused its discretion. (Williams nevertheless proposes, without basis, that the court of appeals relied "upon the trial testimony of the experts alone, without consideration of the underpinnings set forth in the totality of the Offers of Proof. . . ." Williams Pet. at 23.) But "scientific knowledge" under *Daubert* is not judged by the volume of submissions. The reality is, despite the extensive record on appeal, the court of appeals correctly concluded "there was *no showing*" of scientific reliability. (Pet. App. at 13 (emphasis added).) Such a finding explicitly supports the conclusion that the district court abused its discretion in permitting the opinion testimony. *See, e.g., Wright*, 91 F.3d at 1107-08 (in circumstances closely similar to those in *Schudel*, reversing judgment entered on jury verdict; expert's opinion was "simply speculation" and was therefore inadmissible under *Daubert*) ("a plaintiff in a toxic tort case must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover"); *Daubert II*, 43 F.3d at 1319 ("experts' un-

adorned assertions" with no showing of scientific reliability are *per se* inadmissible); *see also, e.g., Rosen,* 78 F.3d at 319 (noting lack of "any experimental, statistical, or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on theory"); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank,* 877 F.2d 1333, 1339 (CA7 1989) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process") (pre-*Daubert*).

5. In sum, Carlson's and Williams' *Daubert*-based arguments do not warrant the Court's exercise of its extraordinary and discretionary jurisdiction. The unanimous decision of the court of appeals does not conflict with any decision of this Court or any decision of any other court of appeals. Nor do the petitions present an important issue of law which needs to be addressed by this Court. Carlson and Williams simply seek reconsideration of the standards for the admissibility of expert testimony set forth five years ago in *Daubert* and affirmed this Term in *Joiner*.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS, WHICH HAVE READILY AND UNIFORMLY ACTED WITHIN THEIR DISCRETION IN APPLYING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE TO A THEN-PENDING CASE IN ACCORDANCE WITH THE EXPRESS INSTRUCTIONS OF THIS COURT.

When General Electric timely filed its post-trial motions, it served copies on certain counsel by hand-delivery and other counsel by Federal Express. Schudel, Williams and Hopkins (collectively, "Schudel" for purposes of this discussion) argue that the motions were technically invalid because they were entitled to receive their service copies by postal delivery rather than by Federal Express delivery. The court of appeals correctly found that Schudel's argu-

ment was moot: amended Federal Rules of Civil Procedure 50 and 59 make clear that the validity of post-trial motions is judged by the date of filing rather than the date or type of service. *See, e.g.*, Fed. R. Civ. P. 50(b) (renew motion for judgment as a matter of law by "filing" within "10 days after entry of judgment"); Fed. R. Civ. P. 59 (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). The ruling was unremarkable and invoked no new or compelling issues of law.

1. This Court has ordered that the 1995 amendments to the Federal Rules of Civil Procedure "shall govern all proceedings in civil cases thereafter commenced and, *insofar as just and practicable, all proceedings in civil cases then pending.*" Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), *reprinted in* 161 F.R.D. 149 (1995) (emphasis added). The court of appeals determined that it was just and practicable and so applied the Federal Rules as amended to this case, which was pending at the time of the amendments.

2. As would be expected given to the express language of the Court's order amending the Rules, there is no conflict among the circuit courts as to whether the amendments may apply to matters pending at the time of the amendments. Instead, "courts interpreting these effective dates provisos consistently have held that when it is 'just and practicable,' new Federal Rules may apply to a particular pending case." *United States v. Roberts*, 88 F.3d 872, 878 (CA10 1996) (citations omitted). In consequence, courts in every circuit have exercised proper discretion and applied the amended rules (or not) after considering whether it was factually appropriate, *i.e.*, "just and practicable," in a broad array of cases: [8]

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[8] This Court has issued similar Orders in various amendments to the Federal Rules of Civil Procedure, the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. *E.g.*, Order of April

District of Columbia Circuit: *Barbour v. Merrill*, 48 F.3d 1270 (CADC 1995) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Bayer v. United States Dep't of Treasury*, 956 F.2d 330, 334-35 (CADC 1992) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending on appeal at time of amendment because "unquestionably" just and practicable).

First Circuit: *Silva v. Witschen*, 19 F.3d 725, 727-28 (CA1 1994) (declining to apply 1993 amendments to Fed. R. Civ. P. 11 under facts of case because infeasible and would work injustice); *Freund v. Fleetwood Enters., Inc.*, 956 F.2d 354, 363 (CA1 1992) (declining to apply amended Fed. R. Civ. P. 15 under facts of case because would be "manifest injustice").

Second Circuit: *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 468 (CA2 1995) (in *dicta*, noting option to remand to district court for "determination of whether applying the [1991] amended version [of Fed. R. Civ. P. 15(c)] would be 'just and practicable' "), *modified on other grounds*, 74 F.3d 1366 (CA2 1996).

Third Circuit: *MCI Telecoms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1091 (CA3 1995) (applying 1993 amendments to Fed. R. Civ. P. 4 to case pending at time of amendment because just and practicable); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298 (CA3 1995) (same).

22, 1993, *reprinted in* 146 F.R.D. 404 (1993); Order of April 30, 1991, *reprinted in* 134 F.R.D. 495 (1991). The illustrative cases in the text arose under these various Orders. By way of contrast, certain Rule amendments may be limited so as *not* to apply to pending cases. *See, e.g.*, Pub. L. No. 104-208, Div. A, Title I, § 101(a) (1996) (amendments to Fed. R. Evid. 413 applicable only to "proceedings commenced on or after the effective date of the amendments, including all trials commenced on or after the effective date"); *see generally* 28 U.S.C. § 2074(a) (1997) (granting Supreme Court the discretion to determine applicability of its federal rules amendments to pending cases).

Fourth Circuit: *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1273-74 (CA4 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because "[n]o injustice would be worked" and applying the amended rule "works to preserve appealability and allows us to reach the merits. . . .").

Fifth Circuit: *Long v. Simmons*, 77 F.3d 878, 879 (CA5 1996) (applying 1995 amendments to Fed. R. Civ. P. 59 to case pending on appeal at time of amendment because just and practicable); *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 765-66 & n.8 (CA5 1996) (applying 1993 amendments to Fed. R. Civ. P. 54(d) to case pending at time of amendment because just and practicable); *Elliott v. Tilton*, 64 F.3d 213, 215-16 (CA5 1995) (applying 1993 amendments to Fed. R. Civ. P. 11 to case pending at time of amendment because just and practicable); *Ford v. Elsbury*, 32 F.3d 931, 933-34 (CA5 1994) (applying 1993 amendments to Fed. R. App. P. 3 to case pending on appeal at time of amendment because just and practicable); *Garcia v. Wash*, 20 F.3d 608, 609 (CA5 1994) (same) (application of amendments "prevent[s] the loss of appellate rights"); *Burt v. Ware*, 14 F.3d 256, 257-58 (CA5 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because just and practicable) ("appellees will not be prejudiced by employment of the new rules; rather they will simply lose a potential 'windfall' of having the appeal dismissed"); *Skoczylas v. Federal Bureau of Prisons*, 961 F.2d 543, 544-46 (CA5 1992) (applying 1991 amendments to Fed. R. Civ. P. 15 to case pending on appeal at time of amendment because just and practicable).

Sixth Circuit: *Ridder v. City of Springfield*, 109 F.3d 288 (CA6 1997) (applying 1993 amendments to Fed. R. Civ. P. 11 to case pending at time of amendment because just and practicable); *Ridder v. City of Springfield*, 1997 U.S. App. LEXIS 5118 (CA6 Mar. 13, 1997)

(applying 1993 amendments to Fed. R. Civ. P. 26 to case pending at time of amendment because just and practicable); *Runfola & Assocs. v. Spectrum Reporting II, Inc.*, 88 F.3d 368 (CA6 1996) ("it was within the district court's discretion as to which version of Rule 11 applied"); *Spurlock v. Demby*, 48 F.3d 1219 (Table), 1995 U.S. App. LEXIS 4321 (CA6 1995) (declining to apply 1993 amendments to Fed. R. Civ. P. 11 under facts of case because not just and practicable).

Seventh Circuit: *Delgado-Brunet v. Clark*, 93 F.3d 339, 344 (CA7 1996) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending at time of amendment because just and practicable); *In re Generes*, 69 F.3d 821 (CA7 1995) (not just and practicable to apply amended Fed. R. Civ. P. 11 under facts of case); *Cunningham v. Waters Tan & Co.*, 65 F.3d 1351 (CA7 1995) (same); *Cleveland v. Porca Co.*, 38 F.3d 289 (CA7 1994) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund*, 25 F.3d 509 (CA7 1994) (not just and practicable to apply amended Fed. R. Civ. P. 11 under facts of case); *Woods v. Indiana Univ.-Purdue Univ.*, 996 F.2d 880, 885-86 (CA7 1993) ("we honor the Supreme Court's express directive, and we therefore hold that the district court should have determined whether it was 'just and practicable' to determine the parties' rights and obligations under the new version of [Fed. R. Civ. P.] 15(c)").

Eighth Circuit: *United States v. Duke*, 50 F.3d 571, 574-76 (CA8 1995) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because just and practicable).

Ninth Circuit: *Schroeder v. McDonald*, 55 F.3d 454, 459-60 (CA9 1995) (applying 1993 amendments to Fed.

R. App. P. 4 to case pending on appeal at time of amendment because just and practicable) ("To allow the parties to proceed to the appeal is just. Further, practicality is no problem."); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 887-88 (CA9 1994) (same); *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1501-02 (CA9 1994) (applying 1991 amendments to Fed. R. Civ. P. 15 to case pending at time of amendment because just and practicable); *Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co.*, 19 F.3d 444, 445 (CA9 1994) (applying 1993 amendments to Fed. R. App. 4 to case pending on appeal at time of amendment because just and practicable).

Tenth Circuit: *United States v. Platero*, 72 F.3d 806, 811 (CA10 1995) (applying 1994 amendments to Fed. R. Evid. 412 to case on remand at time of amendment because just and practicable); *Dahn v. United States*, 77 F.3d 492 (Table), 1996 U.S. App. LEXIS 2801 (CA10 1996) (applying 1993 amendments to Fed. R. Civ. P. 4(m) to case pending at time of amendment because just and practicable); *Espinoza v. United States*, 52 F.3d 838, 840-41 (CA10 1995) (applying 1993 amendments to Fed. R. Civ. P. 4(m) to case pending at time of amendment because just and practicable); *Cole v. Ruidosa Mun. Sch.*, 43 F.3d 1373, 1385-86 (CA10 1994) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1440-41 (CA10 1994) (same); *In re Search of Premises Known as 6455 South Yosemite, Engelwood, Colo.*, 897 F.2d 1549, 1553-54 & n.5 (CA10 1990) (applying 1989 amendments to Fed. R. Crim. P. 41(e) to case pending at time of amendment because just and practicable).

Eleventh Circuit: *Chudasama v. Mazda Corp.*, 123 F.3d 1353 (CA11 1997) (applying 1993 amendments to Fed. R. Civ. P. 33(a) to case pending at time of amendment because just and practicable); *Silvious v. Pharaon*,

54 F.3d 697 (CA11 1995) (applying 1993 amendments to Fed. R. Civ. P. 4 to case pending at time of amendment) ("plain language of Supreme Court's Order indicates that court has discretion as to which version of Rule applies); *Narey v. Dean*, 32 F.3d 1521, 1524 (CA11 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending at time of amendment because just and practicable) ("it is not an injustice for a party to lose the 'windfall' of having an appeal dismissed" on procedural grounds); *Virgo v. Rivera Beach Assocs.*, 30 F.3d 1350, 1355 n.3 (CA11 1994) (same); *Hill v. United States Postal Serv.*, 961 F.2d 153, 156 (CA11 1992) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending at time of amendment because just and practicable).

3. None of these cases adopts a presumption of applicability of a *per se* rule. Nor did the court of appeals do so in this case. Hopkins' accusation that the court of appeals here found the amendments "automatically retroactive," (Hopkins Pet. at 11), is flatly contradicted by the record. The court specifically considered whether, in this case, the amendments would be just—"no prejudice will result"—and practicable—"no additional action on the part of the court or the parties is required to proceed." (Pet. App. at 5.) As the circuits have explicitly and correctly concluded, "the determination of when it is 'just and practicable' to retroactively apply [a Federal Rule], as amended, is necessarily a case-by-case consideration." *Duke*, 50 F.3d at 575. These cases track the guidance of this Court: "Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of a particular case." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 & n.29 (1994).

4. The cases also track "the general purpose of the [federal] Rules," to wit, "to minimize technical obstacles to a determination of the controversy of its merits." *G.F. Co.*, 23 F.3d at 1502 (quoting *United States ex rel. Atkins*

v. Reiten, 313 F.2d 673, 675 (CA9 1963)). *See also, e.g., Conley v. Gibson*, 355 U.S. 41, 48 (1957) (Federal Rules support common law goal to "facilitate a proper decision on the merits"). The law accepts as "just" that which favors substance over procedure. *E.g., Burt*, 14 F.3d at 257-58 (not injustice to "lose a potential 'windfall' of having the appeal dismissed"); *Narey*, 32 F.3d at 1524 (same).

5. In *Landgraf*, this Court referred to a party's "diminished reliance interests in manners of procedure" while explaining why it had determined that amendments to the Federal Rules may apply to pending cases where just and practicable. 511 U.S. at 275 & n.29. The Court confirmed: "Because rules of procedure regulate secondary rather than primary conduct, the fact a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." 511 U.S. at 275. This case of course fairly illustrates the point—no "primary" conduct is at play in addressing the mechanics of service of timely-filed motions.[9]

6. Accepting the possibility that the amendments may indeed be applied to pending cases, Schudel alternatively argues that the court of appeals improperly exercised its discretion in applying the amendments to this particular case. (Schudel Pet. at 15-18; Hopkins Pet. at 15-20.) Schudel's factual complaints—made for the first time here [10]—pose nothing worthy of review. But *certiorari*

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[9] Although Hopkins proposes that this Court has never addressed the question of whether the amended rules of civil procedure may apply to pending cases (Hopkins Pet. at 14), both the Court's enacting Order and *Landgraf* provide the answer. Thus, there has never been controversy on the point in the federal courts.

[10] Schudel failed to respond in the court below to General Electric's submission pursuant to Federal Rule of Appellate Procedure 28(j) advising the court of appeals of the amendments to the Federal Rules. Schudel likewise failed to respond to General Electric's Supplemental Brief and motion for leave to file same relating to the

considerations aside, and even accepting the factual record as presented in the petitions, General Electric observes that Schudel cites to no genuine infeasibility or injustice that followed application of the amended Rules, and there is none. Thus, in the only published case *factually* on all fours with this case, the Fifth Circuit concluded, as did the Ninth Circuit here, that it was just and practicable to apply the 1995 amended rules regarding filing of post-trial motions to a matter pending on appeal at the time of the amendments. *See Long*, 77 F.3d at 879.

7. Schudel proposes that the case was not really "pending." (Hopkins Pet. at 15-17; Schudel Pet. at 16-17.) This odd argument finds no support in this Court's enabling Order and defies the record. The district court and then the court of appeals accepted jurisdiction over the case. No party contests that fact. Consequently, the court of appeals had the discretion to apply the amended rules to the case before it. *E.g.*, *Barber*, 34 F.3d at 1273-74 (applying amendments to case pending on appeal); *Long*, 77 F.3d at 879 (same); *Burt*, 14 F.3d at 257-60 (same); *Skoczylas*, 961 F.2d at 544-46 (same); *Ford*, 32 F.3d at 933-34 (same); *Garcia*, 20 F.3d at 6009 (same); *Cleveland*, 38 F.3d at 289 (same); *Duke*, 50 F.3d at 574-76 (same); *Schroeder*, 41 F.3d at 1276-77 (same); *Wallis*, 26 F.3d at 882 (same); *Leader Nat'l Ins. Co.*, 19 F.3d at 445 (same); *Cole*, 43 F.3d at 1385-86 (same); *Hill*, 961 F.2d at 156 (same); *Narey*, 32 F.3d at 1524 (same); *Virgo*, 30 F.3d at 1355 (same); *Barbour*, 48 F.3d at 1270 (same); *cf. Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836-37 (1990) (appellate court may apply amendments to the law in the first instance "if, 'by its terms,' the law was to be applied to pending cases").

8. Schudel next proposes a collage of possible explanations for why the application of the amendments here was

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amendments. Nor did Schudel seek leave to file anything even after the court of appeals addressed the amendments at oral argument.

not "just or practicable." (Hopkins Pet. at 17-25; Schudel Pet. at 15-18.) Schudel misconceives the import of cases such as *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), *Chenault v. United States Postal Serv.*, 37 F.3d 535 (CA9 1994), and *United States v. 51 Pieces of Real Property*, 17 F.3d 1306 (CA10 1994), none of which involved the Federal Rules. Those cases re-stated the time-honored principle that a new law which impairs vested rights should not be given retroactive effect absent a clear indication in the law to the contrary. In this case, the enabling Order *expressly* allows application of the amended Rules to pending cases. Further, Schudel had no substantive vested right, impaired or otherwise. More precisely, "[n]o one has a vested right in any given mode of procedure." *Ex parte Collett*, 337 U.S. 55, 71 (1949) (quoting *Crane v. Hahlo*, 528 U.S. 142 (1922)).[11]

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[11] Schudel's arguments about the need for "finality" and the importance of "vested rights," (Hopkins Pet. at 20-25; Schudel Pet. at 16-17), in any event spurn the record and fail to address the considerations given by the courts below. The district court accepted General Electric's timely-filed post-trial papers and ruled, correctly, that Schudel had secured a verdict only by relying on a slate of improper and grossly tainted evidence. The court of appeals went even further, finding that a majority of the limited evidence the district court had ultimately found admissible was itself improper and unreliable. Schudel would have his improperly-secured verdicts reinstated by insisting on application of a now-defunct procedural rule. Schudel's equities-based arguments on what is "just and practicable" cannot stand the slightest scrutiny.

Moreover, Schudel's equity argument is baffling even under the old version of Rule 50. He would have General Electric forfeit its right to appeal because, when General Electric timely-filed its post-trial motions, it extended the courtesy of service by overnight mail rather than postal delivery. Schudel's protests aside, there is no innate or constitutional right to service by postal delivery. Indeed, service rules are frequently revised. *See, e.g.*, Fed. Rs. App. P. 25, 26 (1996) (referencing service by commercial carrier); Fed. R. Civ. P. 4 (1995) (same); *see generally* 28 U.S.C. § 2071 (1997) (authorizing district court rulemaking); Fed. R. Civ. P. 83 (same).

9. Finally, General Electric observes that even if the Court saw fit to grant *certiorari* and ultimately determined that the amendments to federal rules may not be applied to pending cases, the ruling would be of doubtful consequence to this case. As General Electric argued in the proceedings below, its post-trial filings, made on the tenth day after entry of judgment and served that day by Federal Express, were proper for several reasons even under the old Federal Rule of Civil Procedure 50 (requiring filing and service within 10 days of judgment): First, Federal Express is indeed the legal and practical equivalent of mail.[12] Second, all parties had consented to service by Federal Express by engaging in service by Federal Express or other alternatives to postal delivery throughout the extensive litigation.[13] Third, lead trial counsel had assumed representation of all plaintiffs, and she had been served by hand-delivery.[14] Any one of those considera-

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[12] *See generally* 18 U.S.C. §§ 1693-1699, 1729 (1982); 39 U.S.C. §§ 601-606 (1982); 39 C.F.R. Parts 310, 320 (1995); 44 Fed. Reg. 61,181 (Oct. 24, 1979) (suspending Private Express restrictions for carriage of express mail or overnight service). Further, as the district court noted and the comments to the newly-amended Federal Rules of Appellate Procedure observe, parties reasonably may expect private express mail delivery to be more prompt and more reliable than postal delivery. *See* Pet. App. at 21; Fed. Rs. App. P. 25, 26 (comments). Those expectations of course were realized here: Schudel's service copies were delivered overnight.

[13] *See, e.g., Magnusen v. Video Yesteryear*, 85 F.3d 1424, 1431 (CA9 1996) (parties' course of conduct may validate mode of service); *Salley v. Board of Governors, University of North Carolina, Chapel Hill, N.C.*, 136 F.R.D. 417 (MDNC 1991) (same).

[14] General Electric noted that lead trial counsel had signed pleadings on behalf of all plaintiffs, had presented many of the plaintiffs on direct testimony at trial, and had otherwise acted as common counsel. *See, e.g.*, Wash. (E.D.) L.R. 1.2(d)(1) ("filing of any pleading shall constitute an appearance by the attorney who signs the pleading"). Although General Electric always extended courtesy service to all counsel, under the Rules General Electric was required to serve only lead trial counsel, which it did. *See, e.g., Buchanan v. Sherrill*, 51 F.3d 227, 228 (CA10 1995) (rules do not require

tions is enough to defeat Schudel's no-service-by-Federal-Express-overnight-mail complaint, quite apart from any question of the proper application of the 1995 amendments in this case.

The court of appeals did not reach General Electric's alternative arguments, or remand to the district court for further findings, or decide the question of whether service had been effected. It did not need to do so; the amendments to the Federal Rules mooted the inquiry. Thus, although the court of appeals—citing its then-new opinion in *Magnusen v. Video Yesteryear*, 85 F.3d 1424 (CA9 1996)—noted in *dicta* its opinion that delivery by Federal Express did not satisfy mail delivery requirements in the Ninth Circuit, it never "concluded that the attempt to serve Hopkins . . . was ineffective and therefore untimely," (Hopkins Pet. at 2 n.1, 9), or that General Electric's post-trial motions were "untimely," (Schudel Pet. at 10). Indeed, to make such a determination even under *Magnusen*, the courts below would have had to determine, *inter alia*, whether the parties' course of conduct permitted service by Federal Express. 85 F.3d at 1431. No such inquiry was undertaken or needed in light of the Rule amendments.

10. As is the case with their *Daubert*-based arguments, petitioners' arguments on application of the Federal Rules pose nothing new or worthy of this Court's extraordinary *certiorari* jurisdiction. The court of appeals applied the usual principles of interpretation, and its unanimous decision does not conflict with any decision of this Court or any other court. *See Roberts*, 88 F.3d at 878 (noting "consistent" interpretation of the effective date provisos of the amendments). Further, when it issued its decision, the court of appeals was acting on the discretion expressly granted to it by this Court.

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service on each of several counsel appearing on behalf of a party); *Daniel Int'l Corp. v. Fishbach & Moore, Inc.*, 916 F.2d 1061, 1063 (CA5 1990) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 97-1410

In The

Supreme Court of the United States

October Term, 1997

MERLIN E. CARLSON, JR.,

Petitioner,

v.

GENERAL ELECTRIC COMPANY, a foreign corporation, KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. REPLY TO STATEMENT OF CASE 1

III. REPLY TO OPPOSITION ARGUMENTS 2

A. A New Trial Motion Under Rule 50(b) Does Not Automatically Attach To A Motion For Judgment Notwithstanding The Verdict 2

B. The *Erie* Doctrine Has Not Been Addressed In Reference To *Daubert*, 509 U.S. 579 4

C. GE's Circular Argument Does Not Address The Conflict Over *Daubert*, 509 U.S. 579 Application 7

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 3

Ambroosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996) 7

Chicago & North Western Railway Co. v. Britten, 301 F.2d 400 (8th Cir. 1962) 2

Daubert v. Merrell-Dow, 509 U.S. 579, 113 S.Ct. 2786 (1993) ..... *passim*

Daubert v. Merrell-Dow, 43 F.3d 1311 (9th Cir. 1995) 6

Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986) 7

Eaton v. Nat'l Steel Production Co., 624 F.2d 863 (9th Cir. 1980) 2

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 5

Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) 5, 6

Hanna v. Plummer, 380 U.S. 460 (1964) 5

Hopkins v. Dow Corning Corp., 33 F.3d 116 (9th Cir. 1994) 7

Jackson v. Wilson Trucking Co., 243 F.2d 212 (D.C. Cir. 1957) 2

Joiner v. General Elec. Co., ___ U.S. ___, 118 S.Ct. 512 (1997) 4

Lust v. Merrell Dow Pharms., Inc., 89 F.2d 594 (9th Cir. 1989) 7

Marbled Murrelet v. Babbit, 83 F.3d 1060 (9th Cir. 1996) 6

TABLE OF AUTHORITIES – Continued

Page

Peterman v. Chicago, Rock Island & Pacific R.R. Co., 493 F.2d 88 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974) 2

Phillips v. Negley, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013 (1886) 2

Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986) 5

Schudel v. General Elec. Co., 120 F.3d 991 (9th Cir. 1997) 4, 5, 6, 7, 8

Stradley v. Cortez, 518 F.2d 488 (3rd Cir. 1975) 2

Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) 6

Tsai v. Rosenthal, 297 F.2d 614 (8th Cir. 1961) 2

COURT RULES, STATUTES, REGULATIONS

Federal Rule of Civil Procedure 1 10

Federal Rule of Civil Procedure 49(a) ..... *passim*

Federal Rule of Civil Procedure 50 ..... 1, 4, 8, 9

Federal Rule of Civil Procedure 50(b) 1, 2, 3, 4

Federal Rule of Civil Procedure 50(c) 2

Federal Rule of Civil Procedure 59 ..... 1, 2

Federal Rule of Civil Procedure 59(b) 3

Federal Rule of Civil Procedure 59(d) ..... *passim*

Fed. R. Evid. Rule 702 ..... 5, 6

20 U.S.C. §2072(b) 4

29 U.S.C. §1910.1000 ..... 1, 9

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. §1910.1499 1

Wash. Admin. Code 296-20-220 1

Wash. Admin. Code 296-62-07515 1

I. INTRODUCTION

In the Ninth Circuit Court of Appeals General Electric Company and Kaiser Aluminum and Chemical Corporation (herein collectively "GE") avoided Merlin Carlson, Jr.'s (herein "Carlson") jurisdictional challenge to the district court's authority. Until the Brief in Opposition[1], GE failed to acknowledge the matters Carlson raised concerning Federal Rules for Civil Procedure (herein "Rule") 49(a), 50(b) and 59(d).

In other cases involving GE and in the appeal below GE has approached differently matters in reference to *Daubert v. Merrell-Dow,* 509 U.S. 579, 113 S.Ct. 2786 (1993). In opposing Carlson, GE raises new positions to steer this Court away from consideration of the issues surrounding Rules 49(a), 50 and 59. GE attributes arguments to Carlson that he neither makes nor advocates.

II. REPLY TO STATEMENT OF CASE

GE compresses the margins of this record. Carlson observes the chemicals involved are closely regulated by federal and state governments. These chemicals are recognized by governments to be exceedingly dangerous to humans. See, e.g., 29 U.S.C. § 1910.1000 *et seq.;* 29 U.S.C. § 1910.1499; and Wash. Admin. Code 296-62-07515.

GE scoffs at Dr. Lantsberger's opinion on "whole body aggravation". These chemicals effect the entire body. In Washington physicians who treat injured workers, are expected to understand the concept of "total body impairment." See Wash. Admin. Code 296-20-220.

Despite GE, Carlson's record amply and specifically supports every facet of his claim and legal positions.

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[1] GE's Brief in Opposition will be referred to as "Br. Opp.". Reference to the appendix will be to those submitted by Carlson in Volumes I and Volume II. References will be "A-#".

III. REPLY TO OPPOSITION ARGUMENTS

A. A New Trial Motion Under Rule 50(b) Does Not Automatically Attach To A Motion for Judgment Notwithstanding the Verdict

GE does not acknowledge the bottom line law that:

> If, on the other hand, the order made was without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court.

See, *Phillips v. Negley*, 117 U.S. 665, 671-72 (1886).[2]

GE, now[3] argues that Carlson incorrectly reasons that the district court ruled under Rule 59(d). (Br. Opp. 5 n. 3). GE bootstraps a position by citing the *Schudel* Court's unsupported conclusion that the new trial order was under Rule 50(b). The record is unsupported because GE failed to request a new trial under Rule 50(b). (A-101, 102)

Implicitly, GE's new position is that all J.N.O.V. motions include a motion for a new trial. If this was true, then the Rule 50(b) language – "[a] motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative" – is surplusage. (A-66, 67) If a new trial motion is automatically attached to a J.N.O.V. motion, then why have the above language in Rule 50(b)? See *Jackson*, 243 F.2d at 216.

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[2] This exception has been consistently endorsed. See, *Eaton v. Nat'l Steel Prod. Co.*, 624 F.2d 863 (9th Cir. 1980); *Peterman v. Chicago, Rock Island & Pacific RR Co.*, 493 F.2d 88 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974); *Stradley v. Cortez*, 518 F.2d 488 (3rd Cir. 1975); *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir. 1961); *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957); *Chicago & North Western Railway Co. v. Britten*, 301 F.2d 400 (8th Cir. 1962).

[3] GE argued Rule 50(c) to the *Schudel* Court. It was unfair to claim Carlson has asserted Rule 50(c), when he did not. *Schudel* incorrectly attributed a Rule 50(c) analysis to Carlson.

GE's argument is necessary because the Rule 59(b) motion was denied. (A-43) The order is silent on which rule granted the new trial. Pushing that a new trial motion is automatic with a J.N.O.V., GE ignores that otherwise there is only one legally plausible conclusion. That is, the court *sua sponte* moved for and granted a new trial on its own initiative.

Under Rule 50(b) the district court has no authority to initiate its own motion for a new trial. In contrast, under Rule 59(d), the district court had provisional authority to move and grant a new trial for a reason that it might have granted a new trial for a party. However, in light of the Rule 49(a) verdict, this district court lacked authority to grant a new trial on waived issues. Foremost, the district court only had ten days to move. The district court waited 134 days post-trial to move. In every respect, the district court lacked jurisdiction to grant a new trial under either Rule 50(b) or 59(d).

When Carlson challenged the authority to grant a new trial, the district court acknowledged the right of an immediate appeal. (A-48; A-108 to 111; A-114, 115). Opposing *certiorari* jurisdiction, GE travels down an irrelevant appellate road and illogically relies on *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980), to thwart review.

A jury decided GE acted wrongfully. Nine years ago, Carlson was repeatedly exposed to 5 to 10 times the permissible exposure limits to a score of chemicals. The jury and the district court agreed Carlson proved neurological damage. The neurological injury means Carlson cannot live independently. He cannot work. He needs daily care and medical care. The trial lasted three months. He spent hundreds of thousands of dollars to prove his case. The jury verdict was three and one half years ago. If no one will hear Carlson's challenge, justice will be three years and thousands of dollars later. Carlson's due process has been ignored. GE fails to provide any reason

why this jurisdiction challenge should continue to be ignored.

Carlson's problem is not unique. If Rule 49(a) can be overuled by a district court disagreeing wiht expert "conclusions" under *Daubert*, new trial orders will run amoke.

B. The *Erie* Doctrine Has Not Been Addressed In Reference To *Daubert*, 509 U.S. 579

Avoiding the *Erie* Doctrine implications as to Rules 49(a), 50(b) and 59(d), GE's new approach[4] begins by stating Carlson "mocks the purpose of the *Daubert* inquiry." (Br. Opp. at 11) GE's new tactic spotlights the need for review. For long ago, it was observed that "[m]any errors, of a truth, consist merely in the application of the wrong names of things."[5]

Redefining the matter, GE tries to steer this Court away from deciding whether *Daubert*, 509 U.S. 579 is a rule of admissibility, sufficiency or both. Despite GE's depictions, Carlson asserts that *after* the opinion is admitted under *Daubert*, the courts in using Rules 49(a), 50 and 59(d) must apply state substantive law to test sufficiency.

GE states "Congress has mandated that such Rule [702] be followed." (Br. Opp. at 10) Standing alone GE's statement ignores the overriding Congressional mandate that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 20 U.S.C. § 2072(b). Practically, GE's position enlarges a chemical defendant's power

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[4] It is noteworthy that GE's pre-Opposition Brief position on "how" *Daubert* is to be used in *Schudel v. General Elec. Co.* was measurably different than the GE's position in *Joiner v. General Elec. Co.*, ___ U.S. ___, 118 S.Ct. 512 (1997). Carlson questions whether GE is now taking a third position as to *Daubert*'s application.

[5] *Ethics*, II, 47, Baruch Spinoza (1677).

while abridging the rights of persons poisoned by chemicals. Questions presented call for defining how admissibility under the federal rules can be harmonized with state substantive law controlling the sufficiency of proof. GE's oversimplistic view advocates that judicial decisions are rote rather than a considered analysis. GE disavows the principles flowing from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), including:

> [T]he message of [*Guaranty Trust Co., v.*] *York* [326 U.S. 99] itself is that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule.

See *Hanna v. Plummer*, 380 U.S. 460, 467 (1964). GE's tact is unwise and unworkable in diversity actions.

It is true this Court observed in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) that the Federal Rules of Evidence, being procedural, the *Erie* Doctrine need not be addressed when considering Fed. R. Evid. Rule 702. 509 U.S. at 589 n.6. Passing Carlson's issues off as minor, GE defines the matter as "highly fact-bound." The problems for litigants are that: (1) some federal courts are considering state substantive law in considering "relevancy" for purposes of admissibility; and (2) some federal courts are using state substantive law to determine admissibility; and (3) other courts are using *Daubert* to test sufficiency of causation proof. GE skirts the need to have predictable and stable diversity jurisdiction.

Counter to GE's notation, the *Schudel* Court raised no new issues is GE's reference to *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Cir. 1986). Pre-*Daubert*, the *Scott* Court repeatedly considered state substantive law in resolving the question of admissibility under Rule 702. *See* 789 F.2d at 1054 and 1055-56. In referencing *Scott*, is GE conceding or disputing that after *Daubert* the courts

consider substantive law in determining the relevancy of proffered expert opinions for purposes of admission?

GE's monologue is that *Stutzman v. CRST, Inc.*, 997 F.2d 291, 296 (7th Cir. 1993) disposes of Carlson's issues. *Stutzman* never mentions, much less discusses, *Daubert*'s implication to *Erie* Doctrine consideration. The *Stutzman* analysis does not rationalize the *Schudel* Courts use of *Daubert* to test the sufficiency. *Stutzman* specifically reasoned "the Federal Rules do not contain any threshold level of certainty requirement." *Stutzman* distinguished between tests for admissibility and sufficiency. *Schudel* as have other Ninth Circuit panels,[6] made no such distinction. The Seventh Circuit recognized "[u]nder the Federal Rules, certainty is an issue for the jury and does not affect admissibility. 997 F.2d at 296. In contrast, what *Schudel* and *Daubert*, 43 F.3d at 1320 believe encompasses "admissibility", is in direct conflict with the Seventh Circuit.[7]

The Seventh Circuit distinguishes between testing admissibility and sufficiency. *Stuzman* and the Ninth Circuit classify the task of admissibility as procedural; therefore, federal law applies. At this point, the circuits diverge. *Stutzman*, 997 F.2d at 296 holds:

> "Rule 702 does **not** require 'that an expert's opinion testimony be expressed in terms of a reasonable scientific certainty in order to be admissible . . . " (Emphasis Added.)

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[6] For example, *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995) views admissibility in terms of substantive state law. Another panel distinguished between a *Daubert* admissibility challenge and a challenge to the sufficiency of proof. *Marbled Murrelet v. Babbit*, 83 F.3d 1060 (9th Cir. 1996).

[7] It is erroneous for GE to hint that Carlson's causation proof was inadequate. The district court held proof of Carlson's neurological injury was sufficient. (A-31, 32).

Contrarily, some Ninth Circuit panels have set a variety of "creditability", i.e., sufficiency, test in the context of a *Daubert* challenge. Some panels hold admissibility involves the court weighing whether an opinion meets state substantive law requirements. 43 F.3d at 1320. Another panel held admissibility involves whether the opinion was developed independent of litigation. *Lust v. Merrell Dow Pharms., Inc.*, 89 F.2d 594, 597 (9th Cir. 1989). These divergent views of admissibility conflict with *Stutzman*, other Ninth Circuit panels and other circuits.[8]

Given GE's present position on how *Daubert* is applied, its citation to *Dawsey v. Olin Corp.*, 782 F.2d 1254 (5th Cir. 1986) is curious.[9] After a special verdict, *Dawsey* recognized that "the jury and not trial court was charged with determining whether any damages occurred . . . " *Dawsey*, 1260. Unlike the *Dawsey's* analysis, GE, as do some of the Ninth Circuit panels *inter alia Schudel*, switches between the tasks of testing for admissibility and sufficiency without comment. Carlson submits the random appellate switching accounts for the confusion and lack of outcome predictability in district courts.

C. GE's Circular Argument Does Not Address The Conflict Over *Daubert*, 509 U.S. 579 Application

On appeal GE lumps the plaintiffs together.[10] For an obvious reason in opposing any *certiorari* jurisdiction, GE

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[8] *Hopkins v. Dow Corning Corp.*, 33 F.3d 116 (9th Cir. 1994) and *Ambroosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996).

[9] Perhaps GE cites *Dawsey* to generate the impression of inadequate proof. On the contrary, Carlson had early, consistent on-going, objective, independent and verifiable proof he was poisoned and injured.

[10] Pre-appeal plaintiffs were treated as separately represented. Then, in a monumental blunder, GE failed to timely serve all plaintiffs but Carlson with the post-trial

attempts to circumvent review by sideswiping Carlson's issues. GE's new circular *Daubert* argument is that challenges to the sufficiency of proof are subsumed by an "admissibility analysis" under *Daubert*. The circular argument facilitates GE's ability to avoid the questions presented in reference to Rules 49(a), 50 and 59(d).

First, GE lines up its cross examination as if it was the only proof. (Br. Opp. at 4-5). GE seeks to make the matter so "highly fact bound" that *certiorari* jurisdiction will not be granted. (Br. Opp. 4-5, 11). Discouraging review, GE alludes that Carlson's proof lacked quality. *Id.* On this record nothing could be further from the truth.[11]

GE buffaloed the *Schudel* Courts into ignoring three months of "quality" evidence, including that: (1) organic solvents are "classic CNS depressants" (A-202); (2) the "neurological symptoms experienced by these workers are consistent with those associated with organic solvents" (A-188, A-217, 218);[12] (3) "[m]ost reports of solvent-related encephalopathy describe . . . very high short-term exposure with loss of consciousness" (A-188); (4) the

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motions. Marcia M. Meade has always ONLY represented Carlson. The blunder resulted in GE persistently blurring Carlson's case with the other nine plaintiffs to maintain a fiction that Ms. Meade accepted service for all plaintiffs.

[11] Despite GE's representation, a pre-trial *Daubert* hearing occurred. Carlson did produce pre-trial proffers on the scientific basis and methodology of the expert witnesses. Carlson's proof addressed GE's distorted position that there were only five known neurotoxic organic solvents, e.g., A-183 to 192, A-195 to 198, 200 to 204; A-224, 226 to 231.

[12] In arguing only five known neurotoxic organic solvents exist, GE leaves out the scientific fact that organic solvents injure by two different mechanisms by: (1) direct action on the nervous cell and, (2) causing cerebral hypoxia from loss of consciousness. GE's scientific shell game illustrates why the test of admissibility *MUST* be directed away from conclusions.

respiratory symptoms resulted from either the organic solvents, sodium hydroxide or the combination of respiratory irritants (A-189, A-232); and, (5) unprotected exposure was to a score of federally regulated hazardous chemicals for times and levels beyond those permitted.[13]

Second, GE writes off the *Erie* Doctrine questions tied to Rules 49(a), 50 and 59(d) by observing *Daubert* was a diversity case, where California had a different admissibility standard. (Br. Opp. 10) Third, GE insinuates Carlson's proof lacked "probable" medical testimony. Carlson did have the requisite competent medical proof. GE glosses over that pre-trial, in-trial, and post-trial the district court found Carlson's experts did meet the most stringent *Daubert* testing. Fourth, GE minimizes the conflicts over *Daubert*'s application as merely different fact patterns. Fifth, GE argues *Daubert* narrows the potential expert testimony. Sixth, GE returns to its belief that its cross-examination was the beginning and end of any *Daubert* analysis. Then in a leap from the *Daubert* "gatekeeper" role to testing sufficiency, GE takes the seventh and final step. This circular argument underscores

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[13] Carlson has identified the hazardous chemicals. See p. 5 footnote 3. GE suggest the injury of Carlson is tenuous. If one thinks about why and how the federal government regulates exposure to these chemicals, it is disingenuous that GE's attempt to disenfranchise the legal questions by hinting injury is problematic. Consider for example the regulation of two of the scores of chemicals at the clean-up. Exposure to perchoroethtylene (PERC), which is also called Tetrachloroethylene, is limited in any eight hour work period to 5 minutes in any 3 hour period of not more than 300 parts per million. 29 C.F.R. § 1910.1000 Table Z-2. Sodium hydroxide limits are 2 mg per cubic meter of air. § 1910.1000 Table Z-1. Like the PERC and Sodium Hydroxide, the score of hazardous chemicals exposure limits are listed under § 1910.1000.

why this Court must define "what" *Daubert* is testing and "how" the *Erie* Doctrine may apply.

The absurd results of GE's circular argument are not unique to Carlson if *Daubert* is both a test for admissibility and sufficiency. Under GE's theory, a party will never know whether a consistent Rule 49(a) verdict will be upheld. Uncertainty will exist despite a finding that an expert's methodology and scientific principles meet *Daubert's* requirements for admissibility. In a nutshell, GE's circular argument allows post-trial judicial second guessing under a *Daubert* sufficiency test. Carlson does not believe that is what this Court intended to be done with *Daubert v. Merrell Dow,* 509 U.S. 579.

III. CONCLUSION

It is obvious GE does not want this Court to review this case. Carlson believes it is because this record demonstrates how out of control litigation can become, when the courts are confused and in conflict over *Daubert v. Merrell Dow,* 509 U.S. 579 (1993). The purpose of Federal Rule of Civil Procedure 1 will be better served for the greatest number of litigants, if this Court addresses the matters now.

Respectfully submitted this 9th day of April 1998.

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